

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 69

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
ET AL., APPELLANTS,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, ET AL.

No. 71

ROBERT N. HARDIN, PROSECUTING ATTORNEY
FOR THE SEVENTH JUDICIAL CIRCUIT OF
ARKANSAS, ETC., ET AL., APPELLANTS,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION**

Civil No. 944

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE
KANSAS CITY SOUTHERN RAILWAY CO., MISSOURI PACIFIC
RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY
CO., ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and
THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

vs.

LAWSON E. GLOVER, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, and JOHN W. GOODSON,
Prosecuting Attorney for the Eighth Judicial Circuit
of Arkansas, Defendants.

COMPLAINT—Filed April 10, 1964

For their Complaint plaintiffs allege:

1.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1331. The matter in controversy herein exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States, to-wit: The due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; Article I, Section 8, Clause 3 of the United States Constitution known as the Commerce Clause; Article VI, Section 2 of the United States Constitution known as the Supremacy Clause; Public Law 88-108 and the award of the Arbitration Board No. 282 pursuant thereto, established by Joint Resolution of

[File endorsement omitted]

Congress and approved August 28, 1963; and the Railway Labor Act, Title 45, United States Code, Sections 151 et seq.

2.

The jurisdiction of this Court is also invoked pursuant to Title 28, United States Code, Sections 2281-2284, this being [fol. 2] an action for an injunction against the enforcement of statutes of the State of Arkansas, to-wit: Act 116 of the Acts of Arkansas of 1907 (Ark. Stats. 73-720, 73-721 and 73-722) and Act 67 of the Acts of Arkansas of 1913 (Ark. Stats. 73-726, 73-727, 73-728 and 73-729).

3.

The jurisdiction of this Court is also invoked pursuant to Title 28, United States Code, Sections 1332 and 2201 and 2202. The matter in controversy herein exceeds the sum or value of \$10,000, exclusive of interest and costs, the plaintiffs are all corporations organized and existing under and by virtue of the laws of states other than Arkansas, and all having their principal place of business in states other than Arkansas, and all defendants are citizens and residents of the State of Arkansas. There is an actual justiciable controversy between these parties hereinafter described.

4.

Plaintiffs, at all times pertinent hereto, have been, and now are, common carriers, engaged in the transportation of property in interstate commerce over railroads which they own and operate in the State of Arkansas and numerous other states. Each plaintiff owns and operates lines more than one hundred miles in length, regularly operates freight trains in Arkansas consisting of over twenty-five cars, and regularly conducts switching operations in cities of the first and second class across public crossings. Plaintiffs are therefore subject to the Acts of the State of Arkansas referred to in Paragraph 2 herein, and reproduced in full in Exhibits "A" and "B" hereto. Total railroad trackage

[fol. 3] in the State of Arkansas is approximately 4,000 miles, of which plaintiffs own and operate in excess of 3,500 miles. Each plaintiff is a "Class I" railroad as classified by the Interstate Commerce Commission, and subject to Part I. of the Interstate Commerce Act (49 U.S.C. §1, et seq.).

5.

Defendants Lawson E. Glover and John W. Goodson are the duly elected, qualified and acting Prosecuting Attorneys for the Seventh and Eighth Circuits of Arkansas, respectively, and as such are charged by law and oath of office to enforce all of the criminal statutes of the State of Arkansas including Exhibits "A" and "B". Defendants each are residents of the Western District of Arkansas, and their Judicial Circuits are located in said District. Each plaintiff regularly conducts railroad operations within the Judicial Circuit of one or both defendants which, if not conducted with the number of personnel prescribed in Exhibits "A" and "B", would constitute a violation of those Acts. Defendants, by virtue of the duties imposed upon them by law, and by virtue of their oaths of office, threaten to enforce the penalties of these Acts, and will, unless restrained by this Court, enforce these penalties of these void and unconstitutional statutes by bringing multiple actions against plaintiffs.

6.

As applied to these plaintiffs, these Acts are in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they are arbitrary, capricious, discriminatory and unreasonable in their operation and bear no reasonable relationship to the purported purpose of safety to employees and the public. The effect of these laws is to require plaintiffs to employ unnecessary firemen and brakemen on freight trains, and unnecessary firemen and switchmen in switch crews, who either have no duties to perform, or whose duties could [fol. 4] be performed with at least equal safety by other

members of the train and switch crews. The cost of employment of these unnecessary employees in Arkansas during the year 1962 to the plaintiffs was in excess of \$6,000,000.

This cost of compliance with these laws during 1962 is typical of the cost so incurred by plaintiffs for some years past in this respect, and of the cost that they are now being required to bear. This burden is imposed upon plaintiffs without any corresponding benefit being obtained that could sustain the Acts as a legitimate exercise of the police power.

7.

As applied to these plaintiffs, these Acts are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution in that they single out the railroad industry in the State of Arkansas, of which plaintiffs are a part, and impose by statute upon it alone, arbitrary, inflexible requirements as to the minimum number of employees which must be assigned in its business as therein provided. No other industry in the State of Arkansas is so burdened. Competing forms of transportation in the State are favored thereby. Act 116 of 1907 exempts railroads with less than 50 miles of line, and Act 67 of 1913 exempts railroads with less than 100 miles of line. All plaintiffs operate railroads of more than 100 miles of line, but there are other rail carriers in Arkansas with less than 100 miles of line, and still others with less than 50 miles of line. The exempted railroads operate in the same geographical areas as plaintiffs, with similar equipment and under similar conditions. The Acts, by subjecting plaintiffs to their rigid, onerous and burdensome requirements, to the advantage of other industries in the State of Arkansas, [fol. 5] and especially competing forms of transportation, not so burdened, together with the classification excluding certain other railroads, are arbitrary, capricious, discriminatory and unreasonable and deny to plaintiffs the equal protection of the laws contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

8.

As applied to these plaintiffs, these Acts are in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause, in that they impose upon plaintiffs' conduct of interstate commerce unreasonable and arbitrary requirements constituting a direct interference with, burden upon, and impediment of such commerce, and in that they greatly and unreasonably increase plaintiffs' operating costs within the State of Arkansas. The Acts therefore impair, for no legitimate purpose, the revenues of plaintiffs and their ability to supply the public with adequate, economical and efficient transportation services at reasonable rates, and are therefore contrary in their operation to the National Transportation Policy expressed in the Interstate Commerce Act, as amended in 1940 and 1958 (49 U.S.C., preceding §1). In addition to the financial burden imposed on plaintiffs by these Acts, they further operate to unduly and unreasonably burden interstate commerce in that some plaintiffs are required to stop or slow interstate trains at various points entering and leaving the State of Arkansas for the sole purpose of loading or unloading employees who are unnecessary to the safe and efficient operation of these trains, and such interstate commerce is therefore unreasonably delayed.

[fol. 6]

9.

As applied to these plaintiffs, these Acts are further in violation of Article I, Section 8, Clause 3 of the Constitution of the United States in that they discriminate against interstate commerce in favor of local or intrastate commerce. Act 116 of 1907 applies only to plaintiffs and the other seven interstate railroads operating in Arkansas, because each of the twelve interstate railroads operating in Arkansas owns and operates in excess of 50 miles of line, and the Act exempts all sixteen of the intrastate railroads operating in Arkansas because each has less than 50 miles of line. Likewise, Act 67 of 1913 exempts all intrastate railroads and its burden falls only on plaintiffs and two

other interstate railroads with at least 100 miles of line. This classification, by which these Acts apply to no intrastate railroad and by which the 1907 Act applies to all interstate railroads and the 1913 Act applies only to interstate railroads, constitutes a direct, substantial and discriminatory burden upon interstate commerce.

10.

In 1908 the Supreme Court of Arkansas held that there was sufficient evidence to support a legislative determination that Act 116 of 1907 promoted public and employee safety to prevent the Court from then saying that "the burden on the carrier is arbitrary and without any corresponding benefit to the public". *Chicago, Rock Island & Pacific Ry. Co. v. State*, 86 Ark. 412, 111 S.W. 456. The Supreme Court of the United States affirmed, holding the evidence to be sufficient to prevent it from then saying "that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view." *Chicago, R. I. & P. Ry. Co. v. State of Arkansas*, 219 U. S. 453 (1911). The evidence, so [fol. 7] considered sufficient by both courts, was testimony presented in the trial court on November 18, 1907 relating to the heavy duties performed by train crews and hazards to which they were exposed, at and prior to that time. The facts that the courts considered relevant support of the legislative determination (86 Ark. 419-420) were:

(a) Due to changes in equipment and methods of operation, much of the conductor's time was taken up with making his reports thereby preventing him from giving much time to the physical handling of the train;

(b) Due to increased car capacity, tonnage, number of cars in trains and increased engine power, there was increased amount of work for brakemen to do, although they were required to stop trains in emergencies only;

(c) It was a daily occurrence for drawheads to pull out, requiring the services of two, and frequently three, men to properly chain up the cars;

(d) That when a train was stopped between stations, it was required that a brakeman be sent to the rear of the train, and frequently required to send another forward, to flag approaching trains, and since safe operation and the rules of the company required the engineer and fireman to remain at their posts only the conductor was available to perform any required work on the train in this situation;

(e) Trains were frequently stopped at, or switched across, public crossings, and public safety often required posting signalmen at these crossings;

(f) In switching it was required that brakemen work the automatic couplers and the connection and disconnection of air hoses; and

(g) Some of the witnesses were of the opinion that [fol. 8] switching could be done with greater safety to the train crew with three brakemen and that the efficiency of train and freight movements would be enhanced with less danger of accidents.

Due to technical advances and changes in methods of railroad operations, such of the above considerations as would tend to support the need of a six-man freight train crew either no longer exist, or the circumstances are so changed that in similar situations under modern conditions the presence of the "third" brakeman would make no contribution to employee safety. Specifically,

(a) The amount of a conductor's time now occupied by making reports is so small that he is available to perform other duties at most times;

(b) Due to improvement in roadbed, rails, equipment and communication, the amount of work for brakemen to perform has greatly diminished to the point that

the "third" brakeman is simply a passenger on most freight trains, and brakemen do not now have the duty of stopping trains, even in emergency, due to employment of air brake systems which stop trains automatically in emergencies;

(c) Due to equipment improvement, draw heads pull out much less frequently than they did in 1907, and flexible cables are now used in place of chains making it a one-man job to handle a car after this has occurred;

(d) Due to improved equipment the occasions for trains to be stopped between stations are much less frequent than in 1907, and it is now only in very limited circumstances that safety and company rules require flagmen both forward and rear of the train. In any event, a flagman forward of the train is required to be there [fol. 9] only briefly, and he can then return to assist with any work to be done, and neither safety nor company rules require the fireman to remain in the engine under these circumstances since he no longer has any duties related to firing or attending to the boiler;

(e) Trains are still frequently stopped at, or switched across, public crossings, and in those instances where posting a signalman is required by considerations of public safety this can be readily accomplished without a crew of six men as required by the Act;

(f) In switching, the much improved couplers and air hoses now in use require only that the brakeman lift a handle causing the cars to uncouple, or to engage the air hoses when cars are being coupled, either operation requiring only 2 or 3 seconds to accomplish and is a one-man job; and

(g) Switching and other train movements utilizing the present equipment can be done most safely by the exposure of the minimum number of employees to the hazards of the employment that are required to perform the work.

Under prevailing circumstances, a crew of four or less would achieve the maximum level of public and employee safety in the operation of a freight train, and the mandatory inclusion of two or more unneeded employees on freight trains unnecessarily exposes them to the hazards of the employment and tends to mitigate against safety in the operation for this reason and also by providing occasion for division and diversion of responsibilities and duties of crewmen and distraction of attention of other crewmen necessary to the operations.

11.

In 1914 the Supreme Court of Arkansas held in *St. Louis, I. M. & S. Ry. Co. v. State*, 114 Ark. 486, 170 S.W. 580, that the evidence was sufficient on the question of whether Act 67 of 1913 promoted public and employee safety that [fol. 10] it could not say "that the Legislature had no grounds for adopting this requirement" of a six-man switch crew. The Supreme Court of the United States affirmed. *St. Louis, Iron Mountain & Southern Railway Co. v. State of Arkansas*, 240 U. S. 518. Both courts regarded their prior decisions in the freight crew case to be governing, there being no showing of substantial change in circumstances. Due to improved equipment, switching operations now can be safely performed with a crew of less than six, and in almost every instance can be safely performed with a crew of not more than four. There has also been a material change in the burden of complying with this Act in that the cost of compliance for the year 1914 for St. Louis, I. M. & S. Ry. Co. (predecessor of Missouri Pacific Railroad Company) was \$54,800 and this cost has increased to the extent that the cost to Missouri Pacific Railroad Company for the year 1962 was approximately \$1,022,000. Similar increases in cost of compliance have been experienced by the other plaintiffs. Under prevailing circumstances, a crew of four or less would achieve the maximum level of public and employee safety in the operations conducted by a switch crew, and the mandatory inclusion of two or more unneeded

employees on switch crews unnecessarily exposes them to the hazards of the employment and tends to mitigate against safety in the operation for this reason and also by providing occasion for division and diversion of responsibilities and duties of crewmen and distraction of attention of other crewmen necessary to the operations.

12.

In a suit culminating in *Missouri Pac. R. Co. v. Norwood*, 13 F.S. 24 (1933) it was asserted that the 1907 and 1913 Acts had become repugnant to the United States Constitution due to the changed circumstances upon which they operated since the prior opinions of the United States Supreme Court. That Court defined the constitutional issues [fol. 11] presented (283 U.S. 249) and then amended its mandate to permit trial on those issues (283 U.S. 809). The three-judge District Court referred the case to a master with directions to receive evidence on two questions: (1) whether there were changed conditions tending to show that dangers to employees or public, against which the Acts were intended to guard, no longer existed or were so materially lessened as to render the Acts unnecessary and arbitrary, and (2) whether the expense of complying with the Acts had become relatively so much more burdensome as to render compliance therewith unreasonable. Based on the evidence so taken, the Court found that there was insufficient change in those conditions to demonstrate that the Acts had become unconstitutional in their operation, and the decision was affirmed in a per curiam order (290 U.S. 600). The record in that case consisted largely of the methods and circumstances of operation of Missouri Pacific Railroad Company subsequent to the passage of the Acts up to 1931. Subsequent to the period so examined by the court, improvements and advancements in equipment and methods of operation by the railroad industry in general, by plaintiffs, and by Missouri Pacific Railroad Company in particular, have either eliminated or materially reduced the hazards to employees and the public existing when the

Acts were passed and during the period reviewed in the *Norwood* decision, and the cost of compliance with these Acts has materially increased as to these plaintiffs. This reduction of hazards has been brought about by the expenditure of vast sums by plaintiffs for improvement of rail, roadbed, ties, locomotives, freight cars, communication equipment, traffic control equipment and safety devices. As a result thereof, these relevant changes have occurred:

[fol. 12] (a) *Locomotives*. In 1931 Missouri Pacific Railroad Company had 824 freight locomotives and 217 switch engines, all powered by steam, and 410 of the freight locomotives had been in service since prior to 1908. At the end of 1962, this Company had 139 freight locomotives, 113 switch engines, and 415 multiple purpose locomotives available for either freight or switching service, and each of these locomotives employed diesel-electric power. The last steam powered locomotive was retired several year ago, and this complete conversion to diesel-electric motive power substantially reduces hazards and discomfort to crew members, and eliminates the duties previously performed by the fireman. During the year ending June 30, 1931, 16 persons were killed and 259 injured due to failures in steam locomotives on all Class I railroads in the United States, and during the 10-year period ending June 30, 1931, six persons were killed and 179 persons injured from this cause on the Missouri Pacific Railroad alone. Locomotive improvements contributing to the safety of employees have been such that in 1961 no person was killed or injured due to failures in steam locomotives on any Class I railroad in the United States and only seven persons received injuries due to defects in diesel or other locomotives.

(b) *Freight cars, couplers, brakes, trackage and roadbed*. Improvements made since the *Norwood* decision have included strengthening rolling stock, complete elimination of arch bars and wooden underframes on cars, adoption of journal lubricator packs, strengthening couplers and journals, employment of roller bearings, installation of heavier

rail, elimination of untreated ties, increased side clearances in yards, lengthened and new sidings, installation of automatic block signal and centralized traffic control, installation of radio equipment for communication between cabooses, [fol. 13] engines and base stations, adoption of more effective braking systems, employment of mechanized laying of rail and tamping of ballast, chemical control of vegetation on right-of-way, substitution of electric lights and lanterns in lieu of oil lights, installation of hot box detectors, installation of grade separations and automatic signal devices at grade crossings, all of which have greatly reduced the hazards encountered by employees in freight and yard service. In the years 1924 through 1928, inclusive, Missouri Pacific Railroad Company transported an aggregate of 1,090,448,051 car miles in Arkansas during the course of which there were 727 road trainmen in freight service injured, and 603 yardmen injured. Due to the reduction of the hazards of the employment, during the years 1958 through 1962, inclusive, only 85 road trainmen in freight service and 92 yardmen were injured in Arkansas, during which period this Company transported 1,338,459,454 car miles in the State.

(c) *Operating methods and duties of trainmen.* Duties of trainmen have been greatly diminished by elimination of water stops that were necessary for steam locomotives, by closing stations at which stops previously were made, and by virtually complete elimination of handling of less than carload freight by road crews. At, and prior to, the time of the *Norwood* decision much of a freight crew's time was required to load and unloan l.e.l. merchandise carried in freight cars, and handling and delivery of this freight is now done by other employees using trucks. Trainmen are no longer required to ride in the middle of trains, nor on the tops of trains, and rules of Missouri Pacific Railroad Company prohibit riding on the top of a moving car. Improved equipment heretofore referred to has greatly reduced "emergency" situations on the road requiring the per-[fol. 14] formance of any work by train crews, and improved

communication and mobile repair equipment has shifted the principal burden of that work from train crews to maintenance employees who are called to correct derailments and other malfunctions. The conductor no longer is required to spend more than a few minutes on record keeping functions on a run, and the fireman no longer has any duties with regard to firing the locomotive or tending to the boiler. The diminution of hazards incident to Missouri Pacific Railroad Company's operations resulting from the foregoing improvements has been sufficiently effective that in the years 1958 through 1962 train and yard service accidents in Arkansas produced injuries to all persons at an average rate of only .00045 per 100,000 car miles, and .02534 per 100,000 train miles, as compared to corresponding injury rates for the 1924 through 1928 period considered by the court in the *Norwood* case of .00276 per 100,000 car miles, and .07176 per 100,000 train miles.

(d) *Cost of compliance.* In 1929 (the most recent year for which this evidence was presented in *Norwood*) the total cost of compliance with the two laws in question to Missouri Pacific Railroad Company was \$481,866 representing 3.94% of the Company's net income for that year. The cost of compliance for the year 1962 was approximately \$2,720,000 representing approximately 25.96% of the Company's net income. This cost has become so much more burdensome, both relatively and absolutely, since *Norwood* as to render compliance therewith unreasonable. The cumulative effect of the changes herein described since the *Norwood* decision and those subsequent to the passage of these Acts and prior to *Norwood*, is that whatever support there may have been for these Acts when adopted, they have now become repugnant to the United States Constitution in their present operation in the particulars set out in Paragraphs 6, 7, 8, and 9.

[fol. 15]

13.

The improvements heretofore described have been adopted to substantially the same extent with regard to

increased safety and diminished workload on switch and freight crews by each of the plaintiffs. This has resulted in a radical reduction in casualties incurred and those hazards that do persist are not lessened or corrected by adding more employees than needed to perform the duties incident to operation of freight and switching activities. The requirement of a six-man freight crew and a six-man switch crew has no logical nor rational relationship to safety of employees or the public, and freight and switch crews can safely carry out their duties with no more than four men. The Acts are therefore unconstitutional as applied to all plaintiffs for the reasons set out in Paragraphs 6, 7, 8, and 9.

14.

Commencing on November 2, 1959, there arose a national labor dispute between most of the nation's railroads, including the plaintiffs, and their operating employees represented by various railroad operating unions. This dispute arose as a result of service of notices upon the unions, pursuant to section 6 of the Railway Labor Act (45 U.S.C. §156), by the aforementioned railroads, proposing changes in existing collective bargaining agreements relating to the use, in Arkansas as well as all other states in the continental United States, of firemen, the consist of train crews, and other subjects. On September 7, 1960, the unions served joint notices, pursuant to section 6 of the Railway Labor Act, upon the railroads, relating among other subjects, to the consist of crews in Arkansas and all other states of the continental United States. Since the dispute was national in scope the railroads and the unions were represented by national committees for the necessary bargaining and re-[fol. 16] lated handling on the subject of the notices.

15.

On October 17, 1960, the parties to the labor dispute, through their representatives, entered into an agreement for the appointment of a Presidential Railroad Commis-

sion to investigate the facts and make recommendations for the fair and proper resolution of the labor dispute arising out of the notices served by both the railroads and the unions. The agreement further provided that the Commission was to report its findings and recommendations to the President of the United States. An executive order establishing the Presidential Railroad Commission was issued on November 1, 1960.

16.

On February 28, 1962, after more than thirteen months of study and deliberation concerning the issues involved in the national labor dispute, the Presidential Railroad Commission issued its report and recommendations which were accepted by the railroads but rejected by the unions. This report found firemen unnecessary on freight trains and the recommendations provided for the elimination of firemen in freight service and for procedures where the number of brakemen could be reduced. In conferences following issuance of the report of the Commission, the railroads sought to negotiate changes in work rules within the framework of the recommendations of the Commission, but the unions refused to consider any settlement of the national labor dispute on the basis of those recommendations.

17.

On May 21, 1962, the unions sent a letter to the National Mediation Board requesting mediation of the national labor dispute pursuant to section 5 of the Railway Labor Act [fol. 17] (45 U.S.C. §155). During the pendency of the mediation, the railroads were prohibited from putting into effect their proposed changes in existing collective bargaining agreements by the provisions of section 6 of the Railway Labor Act (45 U.S.C. §156).

18.

On June 26, 1962, the National Mediation Board, pursuant to section 5, First, of the Railway Labor Act (45

U.S.C. §5, First) proffered arbitration of the national labor dispute under sections 7 and 8 of that Act. The railroads agreed to arbitration, but the unions rejected the proffer, whereupon the National Mediation Board, on July 16, 1962, terminated its services. Under the provisions of section 5, First, of the Railway Labor Act, the railroads were prohibited for thirty days from putting into effect their proposed changes in existing collective bargaining agreements.

19.

On July 17, 1962, the railroads served on the unions a Promulgation of Revisions in Work Rules of operating employees to become effective August 16, 1962. Thereupon, on July 26, 1962, the unions filed suit in the District Court for the Northern District of Illinois, Eastern Division (*Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R.R., et al.*, No. 62C1451) to enjoin the railroads from putting into effect the Promulgation of July 17, 1962. On August 8, 1962, following the filing by the railroads of an amended Promulgation of Revisions in Work Rules of operating employees, the District Court issued an order denying the unions' motion for injunction and dismissing their complaint. However, on August 10, 1962, the court entered an order enjoining the railroads from putting into effect the Promulgation pending appeal. This injunction, pending appeal, remained in effect until March 4, 1963, [fol.18] when it was dissolved following the decision of the United States Supreme Court affirming the decisions of the United States District Court and Court of Appeals (372 U.S. 284).

20.

To avert a threatened strike, the President, by Executive Order dated April 3, 1963, created an Emergency Board pursuant to section 10 of the Railway Labor Act (45 U.S.C. §160) to investigate the national labor dispute. On May 13, 1963, the Emergency Board submitted its report and recommendations which were accepted by the railroads but

rejected by the unions as a basis for settling the national labor dispute. From the date of creation of the Emergency Board and for 30 days following the issuance of its report, the railroads were prohibited by section 10 of the Railway Labor Act (45 U.S.C. §160) from putting into effect their proposed changes in existing collective bargaining agreements.

21.

On June 15, 1963, at the request of the President of the United States, the railroads agreed to extend the 30-day status quo period until July 10, 1963. On July 9, 1963, no agreement having been reached, the President proposed that the parties agree to submit all issues in dispute to Supreme Court Justice Arthur J. Goldberg for final settlement. The railroads agreed to the proposal, but the unions rejected the President's request. On July 10, 1963, shortly before the railroads' Promulgation of Revisions in Work Rules was to take effect, the railroads, at the request of the President of the United States, again agreed to maintain the status quo until July 29, 1963. Thereafter, in a Message to Congress, delivered on July 22, 1963, the President recommended legislation designed to provide procedures for settling the national labor dispute.

22.

Following further unsuccessful efforts by the Secretary of Labor to settle the national labor dispute by negotiation and agreement, Congress adopted a Joint Resolution, approved by the President on August 28, 1963 (Public Law 88-108), to provide for the settlement of the national labor dispute. Acting in conformity with section 1 of Public Law 88-108, the railroads, on August 28, 1963, again rescinded their Promulgation of Revisions in Work Rules, which was to have taken effect on August 29, 1963.

23.

Pursuant to Public Law 88-108, an Arbitration Board was formed and first met on September 11, 1963. The Arbi-

tration Board had the duty, pursuant to section 3 of Public Law 88-108, to make a binding award on the disputes raised by the notices of 1959 and 1960 concerning the use of firemen and the consist of road and yard crews. In making its award the Board was directed by said Public Law to give due consideration to adequate and safe transportation service to the public and further, to consider the interests of the railroads and employees affected. Public hearings were held by the Arbitration Board in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made.

24.

On November 26, 1963, the Arbitration Board issued its Award and Opinion. On the firemen issue, the Board found that firemen " * * * are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels." [fol. 20] On the consist of train crews, or brakeman issue, the Board found that the proper number of brakemen necessary to be used on trains should be established by negotiation and binding arbitration between individual railroads, including the plaintiffs, and their employees, and the Award provided a binding procedure for the determination of these issues.

25.

The provisions of the Award are binding on all parties, including the plaintiffs, and call for the elimination of firemen, with certain restrictions, contrary to the provisions of Exhibits "A" and "B", and permit the reduction of brakemen and flagmen, with certain limitations below the number required by Exhibits "A" and "B". The arbitration Award was the product of the federal mandate set forth in Public Law 88-108, and it was imposed upon the plaintiffs and their employees to settle a labor dispute which threatened

the nation with an emergency. The Award has the sanction and effect of federal law and it is inconsistent with and contrary to the provisions of Exhibits "A" and "B".

26.

As a result of the binding Award, made pursuant to Public Law 88-108, and enacted under the authority of Article I, Section 8, Clause 3 of the United States Constitution, the federal government has entered the field pertaining to regulation of manning of trains and locomotives and, by reason of the commerce clause and supremacy clause of the United States Constitution, has pre-empted the State of Arkansas' power and authority to enforce state legislation inconsistent with, and contrary to, that Award.

27.

The enforcement of Exhibits "A" and "B" will frustrate, hinder and prevent the execution and operation in Arkansas of Public Law 88-108, and the Award made pursuant thereto, and would further frustrate and prevent the nationally uni-[fol. 21] form operation of federal legislation intended by the Congress to provide a uniform solution to a national problem.

28.

Plaintiffs have no adequate remedy at law, and unless this Court enters a Judgment declaring these Acts of Arkansas void and invalid and restrains and enjoins the defendants, as hereinafter prayed, plaintiffs will either be compelled to bear the heavy burden and cost of complying with these unconstitutional laws, as hereinbefore alleged, or will be exposed to prosecution for violations of said laws. The maximum penalty for violation of Act 116 of 1907 is \$500, each freight train run with a lesser crew than prescribed in the Act to constitute a separate offense. In 1962 Missouri Pacific Railroad Company alone ran 17,657 through freight trains in Arkansas, and therefore its maximum aggregate exposure to the penalties of this Act is

approximately \$8,828,500 per year for through freight trains alone, and the other plaintiffs also run thousands of freight trains each year in Arkansas and are therefore subject to the same heavy penalties. The minimum penalty for violation of Act 67 of 1913 is \$50, each crew operated with less men than prescribed by the Act constituting a separate offense, and there being no maximum limitation on the penalty that can be imposed for each offense. The plaintiffs employ many switch crews in Arkansas each year, and therefore violation of this unconstitutional Act would expose plaintiffs to penalties without limitation to the extent of confiscation of their entire properties. Plaintiffs have suffered irreparable injury, and will continue to suffer irreparable injury so long as they are required to comply with these unconstitutional Acts, for none of which can they be compensated by money damages.

Wherefore, plaintiffs pray the Court: (a) That it notify [fol. 22] the Chief Judge of the United States Court of Appeals for the Eighth Circuit of the filing of this Complaint, so that a three-judge court can be convened pursuant to Title 28, United States Code, Sections 2281-2284, inclusive; (b) That the Court advance this action on the docket and order a speedy hearing thereof; (c) That the Court adjudge and declare Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913, and each of them, to be null and void, unconstitutional and of no force and effect; (d) That the Court enter permanent injunctions restraining the defendants, all persons acting under their direction, and all persons acting in concert with them, from enforcing or attempting to enforce Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913, or from advising, instituting, prosecuting or aiding in any action, suit or proceeding of any kind or character to recover from or impose upon or enforce against plaintiffs, their officers, agents or employees, or any of them, any penalty or damage for failure or refusal to obey, observe or comply with the provisions of said Acts, or either of them, or from interfering with or attempting

to interfere with or from advising, instituting, prosecuting or aiding in any action, suit or proceeding to interfere with, restrain or prevent plaintiffs, their officers, agents or employees, or any of them, from operating trains, engines, and employing switch crews within the State of Arkansas without complying with the said Acts; (e) That the Court grant such other or different relief as to the Court may seem just and proper.

Clyde W. Fiddes, Roy P. Cosper, 1517 West Front Street, Tyler, Texas;

Barrett, Wheatley, Smith & Deacon, Citizens Bank Building, Jonesboro, Arkansas;

Attorneys for St. Louis Southwestern Railway Company.

[fol. 23] Ernest D. Grinnell, 906 Olive Street, St. Louis, Missouri 63101;

Warner, Warner, Ragon & Smith, 214 North 6th Street, Fort Smith, Arkansas;

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William J. Smith, Herschel H. Friday, Robert V. Light, 1100 Boyle Building, Little Rock, Arkansas;

Attorneys for The Texas and Pacific Railway Company and Missouri Pacific Railroad Company,
By Robert V. Light, 1100 Boyle Building, Little Rock, Arkansas.

[fol. 24]

EXHIBIT "A" TO COMPLAINT

NO. 116 OF THE ACTS OF ARKANSAS OF 1907

Section 1. No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

Section 2. This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

Section 3. Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

Section 4. All laws and parts of laws in conflict herewith are repealed and this Act shall take effect and be in force thirty days after its passage.

[fol. 25]

EXHIBIT "B" TO COMPLAINT

No. 67 OF THE ACTS OF ARKANSAS OF 1913

Section 1. That no railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and three helpers.

Section 2. It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this Act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this Act.

Section 3. The provisions of this Act shall only apply to cities of the first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

Section 4. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars and each crew so illegally operated shall constitute a separate offense.

Section 5. This Act shall take effect and be in force after May 1, 1913.

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY Co., MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY Co., ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v.

Civil Action No. 944

LAWSON E. GLOVER, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants.

MOTION OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL. FOR LEAVE TO INTERVENE—Filed April 29, 1964

The Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, and the Switchmen's Union of North America move for leave to intervene as parties defendant in the above-captioned matter for the following reasons:

[File endorsement omitted]

1.

Pursuant to legal authorization, the five organizations seeking intervention (hereinafter called Unions) represent, for purposes of collective bargaining and other mutual aid and protection, substantially all of the employees operating the railroads in Arkansas whose jobs are affected by the existence and validity of Arkansas Acts 116 of 1907 and 67 of 1913.

2.

The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in their [fol. 27] capacity as agents and spokesmen for their members in that it would result in the loss of employment of large numbers of such members whose jobs are protected by the statutes being challenged.

3.

The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in that it would result in a large loss of organizational membership and income because of the loss of employment of large numbers of their members whose jobs are protected by the statutes being challenged.

4.

The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in that it would result in conditions on the railroads in Arkansas which would endanger their members and the general public in a manner which the Unions are peculiarly qualified to assert and describe to the court.

5.

The Unions and their members are the real parties in interest to this action, the named defendants having been served purely because of their technical standing in an action affecting criminal statutes.

For the above reasons, among others, it is respectfully urged that the court grant the Unions leave to intervene as parties defendant in this action.

Respectfully submitted,

McMath, Leatherman, Woods & Youngdahl, Attorneys for the Unions, 1330 Tower Building, Little Rock, Arkansas 72201, By James E. Youngdahl.

• • • • •

[fol. 28] Certificate of Service (omitted in printing).

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY CO., MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY CO., ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

LAWSON E. GLOVER, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants.

ORDER GRANTING INTERVENORS LEAVE TO INTERVENE—
May 7, 1964

On this May 7th, 1964, having considered motion for leave to intervene as parties defendant, heretofore filed by The Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and

[File endorsement omitted]

Brakemen, and the Switchmen's Union of North America, in the above entitled cause, and for good cause shown,

It Is Ordered and Adjudged that the said Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, and the Switchmen's Union of North America, be and hereby are granted leave to intervene as parties defendant herein.

Martin D. Van Oosterhout, United States Circuit Judge, Jno. E. Miller, United States District Judge, J. Smith Henley, United States District Judge.

[fol. 35]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY CO., MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY CO., ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

LAWSON E. GLOVER, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, Intervenor.

[File endorsement omitted]

**ORDER GRANTING INTERVENORS EXTENSION OF TIME TO
PLEAD—May 7, 1965**

On this May 7th, 1964, upon motion of Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, Order of Railway Conductors and Brakemen, and Switchmen's Union of North America, intervenors herein,

It Is Ordered that the said intervenors be and hereby are granted a sixty day extension of time for the filing of responsive pleadings in the above entitled cause.

Martin D. Van Oosterhout, United States Circuit
Judge, Jno. E. Miller, United States District Judge,
J. Smith Henley, United States District Judge.

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MIS-
SOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SOUTH-
WESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

LAWSON E. GLOVER, Prosecuting Attorney for The Seventh
Judicial Circuit of Arkansas, and JOHN W. GOODSON,
Prosecuting Attorney for the Eighth Judicial Circuit of
Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, Intervenor.

DEFENDANTS' ANSWER TO COMPLAINT—Filed July 10, 1964

Come the defendants, Lawson E. Glover and John W. Goodson, in their official capacities as Prosecuting Attorneys, by Bruce Bennett, Attorney General and Jack L. Lessenberry, Chief Assistant Attorney General for the State of Arkansas, and state:

1. The defendants admit this court has jurisdiction of this matter, but deny that it has jurisdiction for all of the reasons set forth in Paragraph 1. of the complaint.

2. Defendants admit the allegations contained in Paragraphs 2. and 3. of the complaint.

3. Defendants specifically admit and affirmatively allege that plaintiffs are subject to the provisions of Act 116, Acts of Arkansas of 1907, and Act 67, Acts of Arkansas of 1913.

4. That defendants, Lawson E. Glover and John W. Goodson, are the duly elected, qualified, and acting Prosecuting Attorneys for the Seventh and Eighth Judicial Districts of Arkansas, respectively, and admit the allegations contained in Paragraph 5. of plaintiff's complaint except the allegation that Act 116, Acts of Arkansas of 1907, and Act 67, Acts of Arkansas of 1913, are void and unconstitutional.

[fol. 38] 5. Defendants deny all of the allegations contained in Paragraphs 6, 7, 8, and 9 of plaintiff's complaint, and state affirmatively that Act 116, Acts of Arkansas of 1907, and Act 67, Acts of Arkansas of 1913, are constitutional and valid in every respect and operate within an area of the police power of the State of Arkansas. That

none of the provisions of said acts are arbitrary, capricious, discriminatory or unreasonable. That the State of Arkansas has a responsibility and obligation of requiring the safe operation of railroads in the State of Arkansas. Defendants affirmatively assert that the Acts in question do not violate the due process clause or equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Defendants affirmatively assert that the Acts in question do not violate Article 1, Section 8, Clause 3 of the Constitution of the United States and that the Acts are not contradictory to the National Transportation Policy in the Interstate Commerce Act, as amended.

6. That defendants admit that previous litigation which concerned the constitutionality of the Acts in question were decided adversely to plaintiffs, as stated in Paragraphs 10, 11, and 12 of plaintiff's complaint, but deny that the decisions were rendered, or were conditioned, in the way and manner as alleged by plaintiffs.

7. That undoubtedly, plaintiffs have, in the past years, made some improvement in the mechanical operation of their trains, but defendants deny the allegations contained in Paragraph 13 of plaintiff's complaint for lack of technical information and knowledge on which to form a belief. That notwithstanding some improvements have been made by plaintiffs, the defendants affirmatively assert that Act 116 of 1907 and Act 67 of 1913 are constitutional.

[fol. 39] 8. That defendants admit that there was a national labor dispute involving national railroads and the railroad operating unions as alleged in Paragraph 14 of the complaint, and that negotiations were undertaken by the railroads and the unions as alleged in Paragraphs 15, 16, 17 and 18 of the complaint. The defendants further admit that litigation resulted as set out in Paragraph 19. of the complaint. However, defendants deny that the negotiations and the litigation had any effect whatsoever concerning the criminal statutes of the State of Arkansas and the constitutionality of the Acts in controversy.

9. That defendants deny the allegations contained in Paragraphs 20, 21, 22, 23, and 24 of the complaint for lack of sufficient information and knowledge on which to form a belief and while admitting that certain acts of the President of the United States, in issuing executive order, the dates, the reference to legislation and other matters which are of national record, the defendants deny the conclusions set forth in the complaint.

10. Defendants specifically deny the allegations contained in Paragraph 25 of the complaint and deny that any award of the Arbitration Board on November 26, 1963, requires plaintiffs to eliminate the employment of firemen or that the Award is contrary to the provisions of the Arkansas Statutes in controversy.

11. That defendants specifically deny the allegations contained in Paragraph 26 of the complaint.

12. Defendants specifically deny the allegations contained in Paragraph 27 of the complaint and deny that the enforcement of the Acts in controversy would hinder or prevent the application of Public Law 88-108 and the Award. Moreover, defendants assert that Public Law 88-108 and the Award do not require a "nationally uniform operation," but that the several states were, and have been, [fol. 40] left with full authority to exercise judgment and control over such matters as reasonably within the sphere of the police power of the states.

13. That defendants admit the existence and penalties of Act 116 of 1907 and Act 67 of 1933, and that plaintiffs should comply with the Acts or be exposed to prosecution for violation. Defendants deny all other allegations set forth in Paragraph 28 of the complaint.

14. That defendants deny each and every material allegation contained in the plaintiffs' complaint not specifically admitted herein.

Wherefore, defendants pray that the complaint of the plaintiffs be dismissed; and all other relief.

Bruce Bennett, Attorney General; Jack L. Lessenberry, Chief Assistant Attorney General; John P. Gill, Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted]

[fol. 41] Certificate of Service (omitted in printing).

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI
PACIFIC RAILROAD COMPANY, ST. LOUIS-SOUTHWESTERN
RAILWAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

LAWSON E. GLOVER, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, and JOHN W. GOODSON,
Prosecuting Attorney for the Eighth Judicial Circuit of
Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF
RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Intervenors.

[File endorsement omitted]

INTERVENORS' ANSWER—Filed September 4, 1964

The Intervenor answer the Complaint as follows:

1.

Intervenors are all unincorporated railway labor associations consisting of a Grand Lodge and subordinate lodges and representing a total of approximately 400,000 members nationally and several thousand in the State of Arkansas. Intervenor members in Arkansas are members of the general public and are employed on Plaintiffs' lines inside the State under and in accordance with the Arkansas Full Train Crew and Arkansas Full Switch crew statutes, agreements between the various Intervenor and the Plaintiffs, and various rules. Granting of the relief prayed in the complaint will injuriously affect said members and deprive great numbers of them of their employment and trade, subject them to more hazardous conditions of employment and subject the general public to more dangerous railroad operations, and will hinder the Intervenor from carrying out their lawful objectives.

[fol. 48]

2.

Intervenors specifically deny the jurisdiction allegations of paragraph 2 of the Complaint, and admit the jurisdiction allegations of paragraphs 1 and 3.

3.

Intervenors admit the allegations of paragraphs 4 and 5 of the Complaint except the assertion in the final sentence of paragraph 5 that the Arkansas statutes in controversy are void and unconstitutional which Intervenor specifically deny.

4.

Intervenors specifically deny each and every allegation of paragraphs 6, 7, 8, 9 and 13, together with all assertions of law and implications of fact therein, except that Intervenor admit the allegation in paragraph 7 that plaintiffs

each operate railroads of more than 100 miles and there are other railroad companies in Arkansas with less than 100 and less than 50 miles of line and that Act 116 of 1907 applies to 12 railroads operating in Arkansas and Act 67 of 1913 applies to 8 railroads operating in Arkansas.

5.

Intervenors admit that the three lawsuits noted in paragraphs 10, 11, and 12 were tried and decided adversely to plaintiffs' assertions of law herein, but specifically deny that any relevant technological changes in railroad operations or equipment in Arkansas nor any changed circumstances have rendered ineffective or inapplicable the decision in *Chicago, Rock Island and Pacific Railroad Co. v. State of Arkansas*, 219 U. S. 453 (1911), concerning the necessity for a six-man train crew in the interest of employee and public safety, nor that any relevant technological changes in railroad operations or equipment in Arkansas have reduced the necessity for a six-man switch crew in order to promote public and employee safety as found in *St. Louis, Iron Mountain & Southern Railway Co. v. State*, 240 U. S. 518 (1916). Intervenors specifically deny [fol. 49] that any altered circumstances have occurred or technological changes in railroad operations or equipment have been implemented by these plaintiffs in Arkansas since the decision in *Missouri Pacific Railway Co. v. Norwood*, 283 U. S. 249 (1931) and *Missouri Pacific Railway Co. v. Norwood*, 42 F. 2d 765 (1930) aff'd. 290 U. S. 600 (1933) which has significantly reduced or eliminated the necessity for six-man train and switch crews on Missouri Pacific or the other plaintiffs' trains operating in Arkansas required by law for the safety of the public and railroad employees; and, specifically, Intervenors deny that the duties of firemen have been eliminated as alleged in paragraph 12(a), that there have been any such changes in railroad equipment as alleged in paragraph 12(b) which have eliminated or significantly reduced the hazards to freight and yard employees, nor that any significant changes in operating procedures have occurred since 1931 nor have any minor

changes significantly diminished the hazards of duties of railroad employees as alleged in paragraph 12(c).

Moreover, the following technical changes in railroad equipment and operations described in paragraphs 10 and 12 of the complaint had already occurred and their safety effect was weighed, evaluated and found wanting by the Court in *Missouri Pacific Railway Co. v. Norwood*, 42 F. 2d 675 (1930) aff'd. 290 U. S. 600 (1933), specifically:

1. There have been no significant changes in crew duties material to public and employee safety considerations since 1931. The Missouri Pacific Railroad Co. and these other plaintiffs had lost most of their less-than-carload business by the time of the *Norwood* case and thus railroad operating employees had very little loading and unloading duties, the conductor's duties were set and have remained substantially unchanged since then, and today's flagging and switching duty patterns were already set into their present mold. This feature has not changed significantly since 1931.

2. Larger and more powerful locomotives than were in existence in 1907 and 1914 were in use in 1931, and rolling stock was considerably larger and heavier. Since 1931 engines and rolling stock have grown even more powerful, [fol. 50] larger and heavier. Larger, heavier trains travel faster, further and with more dangerous cargo today.

3. Modern air brakes, couplers, switches and signals were being used in 1931 and any technical changes in those devices since then have minimally met the increased hazards produced by the bigger, heavier and faster trains made possible by the diesel locomotive.

4. No significant technical changes in public crossing protection devices have occurred since 1931 in Arkansas and the number of public crossings maintained by these plaintiffs has not diminished since 1931 but instead has grown in excess of several thousands in Arkansas today, yet the volume of motor vehicle traffic using these crossings in Arkansas has grown enormously multiplying the public crossing hazards found critical over 30 years ago in the *Norwood* case.

6.

Intervenors further specifically deny the allegations of paragraphs 10 and 11 that a crew of four or less can operate a freight train or conduct switching operations with substantial safety to the public and the railroad employees as well as can a crew of six, nor that presence of certain crew members as required by law contributes to the dangers and hazards of railroad operations conducted by these plaintiffs.

a) The sole truly significant technological change in Arkansas railroading bearing on public and employee safety which has occurred since the introduction of couplers and air brakes has been the widespread adoption of the diesel locomotive by plaintiffs during 1954-1958. As a result trains continue to grow even longer and heavier, and also as a result the total property damage from railroad accidents has grown in magnitude and severity. This feature, plus the decline in passenger traffic and the increase in motor vehicle passenger travel has caused significant changes in the nature of the hazards produced by railroad operation:

1. Coinciding with the introduction of diesel locomotives the dollar amount of property damage arising [fol. 51] from railroad accidents has grown drastically;
2. Passenger fatalities and injuries have declined as a result of declining passenger traffic;
3. Employee accident *rates* declined relative to gross operating figures—millions of tons, car miles, or train miles—because those latter figures increased dramatically as a function of increased productivity per railroad employee; and
4. The Interstate Commerce Commission definition of "reportable accident" has recently been changed so as to distort any attempted historical correlation time of accident rates based on differing definitions of accident; the result being that the accident rate

set forth in the complaint does not accurately and fully measure either the current injuries or damage caused by plaintiffs' operations, nor does it accurately measure the potential hazard to either the employees or the general public.

b) The safety hazards generated by the nature of modern industrial and transportation conditions warrant continued State regulation of railroad operations by specification of crew consist. Intervenor's are informed and believe and therefore allege that the type of lading being carried today by these plaintiffs inside the State of Arkansas is such that potential dangers to employees and the public are now multiplied. Giant quantities of industrial chemicals of great volatility and enormous destructiveness are today carried at high speeds through several thousand urbanized areas inside Arkansas across public crossings and through switchyards under such operating conditions that a momentary equipment failure or ~~any~~ defect can cause a dangerous industrial transportation incident of immense magnitude, the hazards of which can be avoided or minimized only by adequate numbers of skilled railroad employees on the [fol. 52] crews operating these trains. Most of this transportation is now conducted at high speeds and on tighter time schedules by means of longer trains made up of larger and heavier rolling stock and on substantially the same roadbeds and curving tracks of thirty years ago, thereby increasing the hazards to the public and the railroad employees, which hazards are directly and materially affected by the size of the crew charged with the responsibilities and duties of this transportation inside Arkansas.

7.

Intervenor's have no information or knowledge sufficient to form a belief concerning the true and accurate, relative or absolute cost of compliance, either to the Missouri Pacific Railroad Company or the other plaintiffs, and therefore specifically deny the allegations on that issue in paragraphs 11 and 12(d); moreover:

a) In connection therewith, Intervenorors are informed and believe and therefore allege that plaintiff railroads are in better financial condition today than at any time in their recent past, and the future appears to hold steadily growing increases in freight revenues and a partial resurgence of passenger travel revenues. Railroad technology promises 100 mph passenger trains, unit cargo freight trains, and fully automated-electronically controlled-computerized yard and switching operations. This past fiscal year was highly profitable for the nation's railroads in general and these plaintiffs shared handsomely in this prosperity. Railroad stocks in general have not declined in market value during the past two years and have actually increased in market value commensurate with comparable industrials, and these plaintiffs' securities have shared in this aspect of resurging railroad prosperity. Railroad stockholder dividends have either remained steady in size or increased in general, and these plaintiffs' stockholder dividends have paralleled this general trend. The relative costs of compliance with the Arkansas Full Crew Laws have not increased unduly in [fol. 53] light of the increased efficiency of these railroads resulting from dramatic improvements in productivity per man.

b) The relative cost of compliance for Missouri Pacific Railroad Co. alone in 1931—in the depths of the Depression and just before that company went into bankruptcy for 20 years—was about 1% of its total revenues, and for the other plaintiffs was doubtless not relatively greater, while in 1962 the Intervenorors are informed and believe the relative percentiles were not significantly higher.

8.

Intervenorors admit the allegations of paragraphs 15 through 22 except insofar as they inaccurately embody the history of the railroad rules dispute, and only to the extent they may accurately state some aspects of the most recent history of the controversy between these Intervenorors and certain railroads concerning railroad work rules in non-full crew law states, but Intervenorors specifically deny

that the scope of the notices published by these Intervenor on September 7, 1960, in the context of that controversy included crew consist matters in Arkansas nor that any award rendered by the Special Arbitration Board under Public Law 88-108 and within the scope of these notices was applicable expressly or impliedly to crew consist matters in Arkansas concerning plaintiffs and the Arkansas members of these Intervenor as alleged in paragraphs 14, 23 and 24 of the Complaint; moreover, Intervenor specifically deny that they are in any manner personally estopped or otherwise inhibited by law or contract under the Special Arbitration Award as paragraph 25 of the Complaint covertly alleges.

9.

Intervenor specifically deny the allegations of paragraphs 26 and 27 of the Complaint that the federal government has preempted the field of local railroad operations concerning the consist of crews through Public Law 88-108, the Special Arbitration Award, or executive branch pro-[fol. 54] nouncements or actions so as to prevent the operation of the Arkansas statutes in controversy.

10.

Intervenor have no information or knowledge sufficient to form a belief concerning the monetary extent of plaintiffs possible exposure to criminal liability for violation of the Arkansas statutes in controversy, and hold no opinion or belief concerning the adequacy of plaintiffs' remedy at law, and therefore deny these allegations of paragraph 28 of the Complaint.

For the above reasons, among others, the Complaint should be dismissed.

McMath, Leatherman, Woods & Youngdahl, By
Eugene F. Mooney, Eugene F. Mooney and James
E. Youngdahl, Attorneys for Intervenor, Suite
1330, Tower Building, Little Rock, Arkansas.

[fol. 55] Certificate of Service (omitted in printing).

[fol. 56]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MIS-
SOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRAN-
CISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY
COMPANY, Plaintiffs,

v. Civil Action No. 944

LAWSON E. GLOVER, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, and JOHN W. GOODSON,
Prosecuting Attorney for the Eighth Judicial Circuit of
Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF
RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Intervenors.

MOTION FOR SUMMARY JUDGMENT—Filed October 17, 1964

Under the provisions of Rule 56, F. R. Civ. P., plaintiffs
move for Summary Judgment in their favor on the follow-
ing grounds:

1.

That Act 116 of the Acts of Arkansas of 1907 and Act 67
of the Acts of Arkansas of 1913 are pre-empted by federal
legislation in conflict therewith, to-wit: Public Law 88-108
and the award of Arbitration Board No. 282 pursuant
thereto; the Railway Labor Act, Title 45, United States
Code, Sections 151 et seq.; and the Interstate Commerce

[File endorsement omitted]

Act, Title 49, United States Code, §1 et seq., and particularly the preamble thereto (49 U.S.C., preceding §1).

2.

That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 constitute discriminatory legislation against interstate commerce in favor of intrastate commerce in contravention of the Commerce Clause of the Constitution of the United States.

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3.

That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 constitute a denial of the equal protection of the laws to plaintiffs in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

4.

That there is no genuine issue as to any material fact relating to the foregoing allegations.

Wherefore, plaintiffs move for Summary Judgment granting the relief sought in the prayer of the Complaint filed herein.


On Behalf of All Attorneys Signing the Complaint
Herein

Robert V. Light, 1100 Boyle Building, Little Rock,
Arkansas, Attorney for Plaintiffs.

[fol. 58] Certificate of Service (omitted in printing).

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 3

(See opposite) 

[fol. 59]

88TH CONGRESS } HOUSE OF REPRESENTATIVES { DOCUMENT
1st Session } No. 142

RAILROAD-LABOR DISPUTE

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

RELATIVE TO RAILROAD-LABOR DISPUTE

JULY 22, 1963.—Referred to the Committee on Interstate and Foreign Commerce and ordered to be printed

To the Congress of the United States:

This Nation stands on the brink of a nationwide rail strike that would, in very short order, create widespread economic chaos and distress. After more than 3½ years of constant but fruitless attempts to achieve a peaceful settlement between the parties through every private and public means available, this dispute has reached the point where only prompt and effective congressional action can assure that serious injury to the public will be prevented.

BACKGROUND OF THE CASE

This dispute is between virtually all of the Nation's major railroads and the five railroad operating brotherhoods—the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America. It involves—in addition to the more traditional issues of wage structure and fringe benefits—new and complex issues relating to changes proposed by the carriers and the brotherhoods in work rules affecting the manning of certain railroad operations and the assignments of particular crafts. The background and history of this case, the issues in dispute and the respective positions of the parties have been clearly and concisely set forth in a July 19, 1963, report unanimously signed by six tripartite members of a special subcommittee of the President's Advisory Committee on Labor-

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Management Policy. That report, including the appendixes, is included as an appendix to this message, and should be carefully read by all who seek the facts on this case.

Without attempting to summarize either the findings of that report or the excellent work of the other panels mentioned below, the following points are worth noting:

After the carriers on November 2, 1959, had served notice of proposed rules changes on the brotherhoods, and the brotherhoods had served notice of other proposed rule changes on September 7, 1960, and no agreement was forthcoming, both parties agreed on October 17, 1960, to submit the entire subject to a special Presidential study commission of 15 members, composed of an equal number of public, railroad, and brotherhood representatives. Following 13 months of extensive hearings and deliberations, 15,500 pages of oral testimony and more than 300 exhibits, this Presidential Railroad Commission, under the chairmanship of Judge Simon H. Rifkind, recommended specific rules changes and employee protection provisions in a comprehensive 342-page report.

Following a Supreme Court determination that there was no legal barrier to the carriers initiating such changes, with appropriate bargaining and recourse to the Railway Labor Act procedures, and following the continued inability of the parties to negotiate an agreement, the National Mediation Board recommended to the parties that the case be submitted to binding arbitration.

As disagreement continued and a nationwide strike threatened an Emergency Board established pursuant to section 10 of the Railway Labor Act, under the chairmanship of Judge Samuel I. Rosenman, following its own unsuccessful efforts to mediate the dispute, made a series of recommendations designed to serve as the basis for constructive collective bargaining.

After further discussions and an extension at my request of the status quo period, the Secretary of Labor on July 5, 1963, recommended solutions for the two most controversial issues along with procedures to dispose of the rest.

On July 9, 1963, I recommended to the parties that all issues be submitted for final settlement to Associate Justice of the Supreme Court Arthur Goldberg, whose judicious temperament, expert competence, and many successes as a mediator uniquely deserved the confidence of both parties. This recommendation, and each of the preceding four sets of recommendations, were accepted by the carriers; but the brotherhoods rejected them in whole or in part.

On July 10, at my request, the parties agreed to maintain the status quo until July 29 to permit time, first, for the Labor-Management Subcommittee to examine and report the issues, and, second, for the Congress to consider this entire matter. It was my hope—and remains such—that the parties would recognize the importance of settling this dispute without resort either to legislation or to a crippling national strike. However, too little progress has been made in the past 11 days to release me from my July 10 commitment to transmit to the Congress on this date a review of the case and my recommendations for its disposition.

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We face this prospect: In the absence either of an agreement, postponement, or reversal of position on the part of the parties, or of enactment of some contrary measure on the part of the Congress, July 29 will almost certainly witness the start of a general rail strike. The carriers on that date can be expected to initiate work rules changes along the lines of those approved by the various panels. And the brotherhoods thereupon can be expected to strike 94 percent of the Nation's rail mileage.

THE EFFECTS OF A PROLONGED NATIONWIDE RAIL STRIKE

In the event a strike occurs it will bring widespread and growing distress.

Many industries which rely primarily on rail shipment—including coal and other mining which is dependent on rails leading directly to the mine, steel mills that ship by rail, certain chemical plants which load liquids directly into tank cars, and synthetic fiber mills dependent on chemicals which for safety reasons can be carried only in rail tank cars—all of these and others would be forced to close down almost immediately. There would not be enough refrigerated truck capacity to transport all of the west coast fruit and vegetable crop. A substantial portion of these and other perishable products would rot. Food shortages would begin to appear in New York City and other major population centers. Mail services would be disrupted. The delay, cost, and confusion resulting from diverting traffic to other carriers would be extremely costly; and considerable rail traffic would be wholly incapable of diversion.

The national defense and security would be seriously harmed. More than 400,000 commuters would be hard hit.

As more and more industries exhausted their stockpiles of materials and components—including those engaged in the production of automobiles, metal products, lumber, paper, glass, and others—the idling of men and machines would spread like an epidemic. Construction projects dependent on heavy materials—exports and waterway shipping dependent on rail connections—community water supplies dependent on chlorine which also moves only by rail—slaughterhouses and stockyards, iron ore, rubber and machinery, magazine publishers, and transformer manufacturers—all would be hard hit by a strike. The August grain harvest would present a particularly acute problem.

The Council of Economic Advisers estimates that by the 30th day of a general rail strike, some 6 million nonrailroad workers would have been laid off in addition to the 200,000 members of the striking brotherhoods and 500,000 other railroad employees—that unemployment would reach the 15-percent mark for the first time since 1940—and that the decline in our rate of GNP would be nearly four times as great as the decline which occurred in this Nation's worst postwar recession.

At the same time, shortages and bottlenecks would increase prices—not only for fruits and vegetables but for many industrial materials and finished products as well—thus impairing our efforts to improve our competitive posture in foreign and domestic markets and to safeguard our balance of payments and gold reserves. And even if the strike were ended by private or congressional action on the 30th day,

at least another month would be required before the economy would be back on its present expansion track. Indeed, a prolonged strike could well break the back of the present expansion and topple the economy into recession before the tax reductions and other measures now before the Congress for reinforcing the expansion have had a chance to take hold.

THE LEGISLATIVE SETTING

In short, the cost to the national interest of an extended nationwide rail strike is clearly intolerable. No responsible government could accept the present situation with complacency. Because in the past both sides have recognized the serious consequences involved, there have been only two brief national rail strikes in this century. The likelihood of a strike next week thus means that we are confronted with an extraordinary situation, both in terms of the impact of the strike on our economy and in terms of the issues involved. These issues, unlike those of typical wage disputes, are ones with very little collective bargaining play left in them. The work rules aspects of the present dispute are regarded as do-or-die matters by both parties—and the history of industrial relations shows that when employers and employees consider the issue to be this vital, they can both stand a strike much longer than the country can stand it. Therefore the parties being unable or unwilling to reach agreement or accept arbitration, and the executive branch having exhausted all statutory and other tools available, the responsibility now lies with the legislative branch.

The Congress has expressly refused to give the Executive authority to seize the railroads in time of peace and has expressly excluded railway labor from the national emergency provisions of the Labor Management Relations Act of 1947. The Supreme Court has stated that the Congress is the appropriate forum for considering remedies against strikes designed to prevent the railroads from reducing employment for economic reasons (*Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 342). When adopting the Railway Labor Act in 1926, moreover, it was contemplated that special congressional action might be required—

to protect the public interest in adequate and uninterrupted transportation. If (the bill) does not so work * * * so as to avoid any impairment of the public interest * * * Congress will be unembarrassed in adopting any means it sees fit to protect the public interest (report of the Senate Committee on Interstate Commerce, S. Rept. 222, 69th Cong., 1st sess., 1926).

In 1916, the Congress set a precedent that is of interest today. As the result of a dispute over hours and wages, the railroad brotherhoods had issued a call for a nationwide rail strike; and President Wilson held a conference with the parties. When he proposed arbitration, the carriers agreed and the brotherhoods refused. When he proposed the 8-hour standard of work and wages, the brotherhoods agreed and the carriers refused. Confronted with the prospects of an early strike, the President then asked Congress to enact the 8-hour standard as an interim law pending a further report to the Congress by a special Presidential Commission. He pointed out that he had—

no resources at law * * * for compulsory arbitration, to save the commercial disaster, the property injury, and the personal suffering of all * * * if the strike was not prevented.

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The Interstate Commerce Commission, he stated, would protect the carriers through its rate powers against any undue cost increases resulting from this change. Congress acted promptly and effectively; and the Supreme Court (*Wilson v. New*, 243 U.S. 332, 333, 342, 1917), emphasizing the fact that the nature of the railroad industry required both employers and employees to defer to regulation in the public interest, held that Congress had the power to impose a settlement binding on both parties—

for a reasonable time, in order that the calamity may be averted and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own.

With all of these legal, economic, and other facts in mind, this administration has given careful consideration to the kind of legislation Congress might usefully enact to meet the needs of the present situation.

Ineffective measures which would not halt an injurious nationwide rail strike have been rejected as inconsistent with the public interest.

Punitive antilabor measures which would destroy railway labor's rights to collective bargaining and reasonable job security have been rejected as harmful to the Nation and insensitive to the very real issues posed by the proposed work rule changes.

Seizure of the railroads has been rejected as unjustified in the circumstances of this case, as creating complex legal and financial problems for the Government, and as merely postponing the day of reckoning on more efficient work rules and their acceptance by the brotherhoods.

Compulsory arbitration of this dispute by a special or congressional panel has been rejected as inconsistent with the principle that solutions reached through free collective bargaining should always be permitted and preferred.

Indefinite extension of the status quo for one or both parties has been rejected as an evasion of a serious public, as well as labor-management, issue that must be squarely faced.

Our objective instead was to find a solution which—

- (1) Is sufficiently familiar to the Congress, in terms of the procedures and principles involved, to facilitate its prompt enactment;
- (2) Encourages the parties to achieve their own solutions through collective bargaining;
- (3) Confronts the parties, on issues where voluntary agreement is not possible, with methods and standards of solution which are comparable to those both sides have previously experienced and found acceptable;
- (4) Recognizes both the public interest in promoting railroad efficiency and preventing a disastrous strike and the public's concern for those adversely affected by a settlement; and
- (5) Provides for an interim remedy while awaiting the results of further bargaining by the parties.]

RECOMMENDED LEGISLATION

As noted above, the railroad 8-hour law of 1916 provides a precedent for congressional intervention of this type; and the Interstate Commerce Act provides a pattern to which both Congress and the parties

are accustomed. Recognizing that both railroad mergers and their effect on railroad employment are deeply affected with the public interest, section 5 of that act wisely supplements the results of private decision-making and collective bargaining in this area with the quasi-judicial regulatory powers of the independent Interstate Commerce Commission. Proposed mergers must be passed upon by the Commission after due regard to their effect on public service and safety, the rights of employees and other considerations. In its order of approval the Commission includes specific terms and conditions to protect the job security of the employees involved. The carriers and brotherhoods remain free to supersede these employee security provisions with their own collective bargaining agreement. The value which railroad and other unions attribute to this section was reflected in their urging that comparable provisions be included in this year's mass transportation bill; and there are such provisions in this bill as it passed the Senate and as it was reported in the House.

There is no reason why these principles and procedures, if they are applicable to the employment security problems raised by railroad mergers and mass transit modernization, are not equally applicable to the employment security problems raised by railroad modernization and mechanization. An expert body should pass on these proposed rule changes in the light of public service and safety; and it should also make provision to prevent the employees from bearing the full cost of technical or economic progress, so long as priority is given to agreements privately reached by the parties themselves.

I recommend, therefore, that—for a 2-year period during which both the parties and the public can better inform themselves on this problem and alternative approaches—interim work rules changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification to the Interstate Commerce Commission in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act, the Commission being directed to use to advantage the work of the two previous panels which received evidence on these matters. At its discretion, the Commission may also appoint a special advisory panel to assist it in the discharge of its functions. The Commission shall judge the effect of each proposed rule on the adequacy and safety of transportation service to the public and on the interests of both parties; and it shall, with the advice of the Secretary of Labor, require fair and equitable arrangements to protect the interests of the affected employees, giving proper weight to the protection provisions of section 5(2)(f) of the Interstate Commerce Act and those recommended by the Presidential Commission and Emergency Board reports. Emerging from the recommendations of these boards was the principle that, while many jobs would not be filled following the death, retirement or voluntary transfer of the present occupants, every present employee with a significant attachment to the railroad industry would retain the right to his present employment or to comparable railroad employment at comparable pay. Provisions would also be made for rehiring priority, relocation expenses, displacement allowances, education and retraining grants, supplemental severance and retirement benefits and other features. In short, no one would be thrown out in the street; and, while the railroads gradually modernized their operations, there would be little, if any, loss to individual employees.

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Unlike compulsory arbitration, this method would preserve and prefer collective bargaining and give precedence to its solutions. But any strike or lockout designed to impose a rules change which has not been approved by the Commission or the parties, or to oppose one which has been approved, would be subject to the remedies of section 5(8) of the Interstate Commerce Act.

This procedure is most appropriate to the disposition of those rule changes involving the manning of train or engine crews—the automation issues, in a sense. It would build on the progress made to date in defining and refining those issues through the various panel studies and subsequent bargaining efforts.

While the disposal of those issues should be sufficient to remove the barriers to a peaceful solution of all other issues by collective bargaining between the parties, many of them are closely interrelated to the work rules changes—and I recommend that the same joint resolution of the Congress provide that either party may submit such issues to the Commission to be settled by procedures deemed appropriate by the Commission.

I stress the fact that, unlike compulsory arbitration, these procedures would provide only interim changes and only for those situations and for such length of time as the parties are unable to agree by collective bargaining. This was also true of the 1916 act. Experience with both the interim rules and these temporary procedures should enable the parties to consider in 2 years, under considerably less pressure, whatever more comprehensive and final solution is needed, if any.

This recommendation contemplates that the Nation as a whole, which shares in the benefits, would also bear part of the burden imposed by advancing railroad technology. To the extent that provision for retraining and other payments may be available to an employee under the Manpower Development and Training Act of 1962 or other Federal statutes, the carrier will be relieved of this obligation. As Congress recognized in the readjustment provisions of the Trade Expansion Act and selective service laws, the Government has some obligation to assist those adversely affected by governmental decisions which are required in the national interest; and there is little logic in protecting the economy by methods which also lead to increased unemployment and more distressed areas. The unfairness of placing the entire burden of readjustment costs upon either the carriers or the workers is an additional reason why legislation is particularly appropriate in this case.

The combination of elements stressed in this bill—permitting progress for the carriers and assuring job security and readjustment assistance for the workers—was also stressed by both the Presidential Railroad Commission and the Emergency Board established in this case. Referring to the provisions of section 5 of the Interstate Commerce Act and their successful application to other areas, the Presidential Commission states:

An adequate program to realize the benefits of advancing technology in the public interest, therefore, must include both reasonable opportunity for management to achieve change, and for workers to enjoy reasonable protection against the harsh effects of too sudden change. Progress plus protection must be our choice * * * in the case of technological improvement * * * as in the case of mergers.

The Emergency Board stated:

We are mindful also of the necessity for progress in the railroad industry, for efficiency in order to meet the challenge of competing industries. We have sought by our recommendations to increase these prospects of the carriers, and at the same time to preserve not only strong unions for the employees, but for the individual worker a continued life of usefulness to himself and his family, and to society itself. The railroads, and society as a whole, have benefited by these changes; and they should both share generously in the burdens which have been cast upon the workers by the dislocations. These burdens, in addition to dollar payments, involve education or retraining for new jobs at the expense of the carriers, supplemented by public funds now or hereafter committed to general retraining of displaced manpower.

AUTOMATION

This brings me to the broader issue to which this message is addressed. The dispute which confronts us today has many special features—including the unusual public interest nature of the industry, the disastrous impact of a prolonged strike, and the particular circumstances of this case. It would be wholly inappropriate to make general and permanent changes in our labor relations statutes on this basis.

It would be particularly unwise to enact a general and permanent compulsory arbitration law, which I have always opposed. The Congress contemplated, in enacting the Railway Labor Act as well as the Labor-Management Relations Act of 1947, that special actions by the Congress may be required as a final recourse in any individual dispute; but the automatic assurance of compulsory arbitration would encourage one or both parties to neglect their bargaining responsibilities. The measure I am recommending today, in contrast with compulsory arbitration, gives encouragement and preference to solutions reached by collective bargaining, and provides only for interim decisions. It recognizes, moreover, that disputed rules changes and their effects on employment are appropriately matters for regulation by an independent agency which has specialized knowledge of the railroad industry and possesses procedures for handling these matters.

I would be remiss in my duty, however, if I failed to note that this dispute over railroad work rules is part of a much broader national problem. Unemployment, whether created by so-called automation, by a shift of industry to new areas, or by an overall shortage of market demand, is a major social burden.

During the past 6 years the level of unemployment has remained far too high. Men have been without jobs and factories have been without orders, primarily because the overall level of market demand has fallen short of the Nation's productive capacity. But when job opportunities are already scarce, those whom technological progress or industrial change displaced are more likely than ever to join the ranks of the unemployed than to find a new job. General unemployment is thus a double burden; as it penalizes those without jobs, it also creates fear and resentment against the very kind of modernization and change upon which our economic progress must in the long run depend. This is why I have placed such heavy emphasis upon the prompt enactment of my tax proposals, designed to stimulate market demand and return the economy to full employment.

To be sure, even with full employment, economic change will still bring problems in the wake of progress. Problems will remain for

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workers who are displaced by advances in technology, obsolescence of their skills or their industries, inadequacy of their education or training, or geographical shifts in economic activity. These problems are not new; they are the price of progress in any dynamic society. More particularly, the phenomenon that we call automation is not new; technological innovation and change have been the mainspring of economic growth in this country for more than a century. Nor is there yet convincing evidence that the overall pace of such change has accelerated recently.

But seen through the magnifying lens of our general unemployment problem of the past 6 years, the difficulties faced by those who are technologically and structurally displaced from work have captured unprecedented attention; and this is as it should be. Our awareness has been mounting that it is unfair to ask particular workers—or in some instances, even particular employers—to bear the full social costs that attend such progress.

This problem is particularly but not exclusively acute in the railroad industry. Forty percent fewer employees than were employed at the beginning of this decade now handle substantially the same volume of rail traffic. The rapid replacement of steam locomotives by diesel engines for 97 percent of all freight tonnage has confronted many firemen, who have spent much of their career in this work, with the unpleasant prospect of human obsolescence. The introduction of self-propelled vehicles for railroad maintenance, repair and construction work—the use of longer, heavier, faster and more efficiently filled trains—and the initiation of centralized traffic control, electronic inspection equipment, telephonic and radio communications, and automatic switching and braking equipment have all decreased the need for railroad employment. [The Presidential Commission was established in part, it said, because of the need to close the gap between technology and work.

That Commission recognized, however, that—

revolutionary changes even for the better carry a high price in disruption * * * (that) might exceed the value of the improvements.

Yet we cannot stop progress in technology or arrest economic change in transportation or any other industry—nor would we want to. For technological change has increased man's knowledge, income, convenience, leisure, and comfort. It has reinforced this Nation's leadership in scientific, economic, educational, and military endeavors. It has saved lives as well as money, and enriched society as well as business. Our task as a nation, to use the phrase of the Commission report, is simply to make sure that this public blessing is not a private curse. We cannot pretend that these changes will not occur, that some displacement will not result or that we are incapable of adapting our legislative tools to meet this problem.

While last year's Manpower Development and Training Act recognized the Federal Government's responsibility to help retrain and readjust workers who have been displaced by industrial change, as do this year's vocational education proposals, their scope is too limited to provide the full answer to a problem of this magnitude. The problems of manpower displacement, of which automation is only one cause, should not be settled primarily by the use of private economic power and pressure, or discussed only on the picket lines. They cut

across many departments of Government, all types of occupations, all standards of income, all sections of the country. Their solution is of importance to the entire Nation which now enjoys all the benefits of economic progress but, except when it is part of the employee group affected, now bears very little of its burdens.

For these reasons, it is my intention to appoint a Presidential Commission on Automation, composed of the ablest men in public and private life, and charged with the responsibility of—

(1) Identifying and describing the major types of worker displacement, both technological and economic, which are likely to occur during the next 10 years, and the social and economic effects of these developments on our economy, our manpower, our communities, our families, and our social structure and human values; and

(2) Recommending, in addition to those actions which are the responsibility of State and local government and private management and labor, specific administrative and legislative steps to be taken by the Federal Government in meeting its responsibility to share the costs and alleviate the losses of automation job displacement, in such a way as to assure both the continued advance of our technology and the continued well-being of our people.

This Commission should undertake the most comprehensive review of this complex and many-sided subject ever ventured, and report no later than the close of next year. Its report must pioneer in the social, political, and economic aspects of automation to the same extent that our science and industry have pioneered in its physical aspects. For the pending railroad dispute is likely the first of many, and a comprehensive long-range policy will be needed. I have no doubt, let me add, that such a policy will embody the basic elements of the measure recommended today—encouraging the advance of technology while protecting the security of the workers, encouraging private bargaining while protecting the public interest.

Thus the prompt enactment of this measure by the Congress will help launch a new national effort to meet the growing challenge of worker displacement by technological and economic change. Both the proposed bill and the new Commission are actions that will benefit both labor and management—but above all, they will benefit the public interest, and that is our primary test.

JOHN F. KENNEDY.

THE WHITE HOUSE, July 22, 1963.

JOINT RESOLUTION To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that transportation services of these carriers be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

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Whereas the Congress finds that emergency measures are essential to secure the continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining, and preserves the carriers' right to initiate work rules changes under procedures to which they are accustomed and assures reasonable conditions of employee security: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That changes in work rules involving the manning of train or engine crews and the protection of the interests of employees affected thereby, which changes come within the area of those proposed by a carrier in the notices of November 2, 1959, or by a labor organization in the notices of September 7, 1960, shall become effective upon application to and approval or modification by the Interstate Commerce Commission in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act, such rules to be operative only as interim rules and until the current controversy regarding such rules is resolved by the parties through continued collective bargaining; and no provision in this joint resolution shall be construed as limiting the right and responsibility of the carriers and organizations to reach agreement regarding such rules.

SEC. 2. An application filed under section 1 shall be given priority over all other matters pending before the Commission, and shall be acted upon within 120 days after it is filed or as soon thereafter as is practicable. The Commission may consider as evidence before it the evidence introduced before the Presidential Railroad Commission, created by Executive Order 10891, of November 1, 1960, and before Emergency Board 154, created by Executive Order 11101, of April 3, 1963, and shall not be required to receive evidence cumulative thereto. The Commission may establish a special advisory panel to assist in the discharge of the functions conferred upon it by this joint resolution.

SEC. 3. In acting upon an application filed pursuant to section 1, the Commission shall give due consideration to the effect of the proposed rule upon adequate and safe transportation service to the public and upon the interests of the carrier and the employees affected, giving due consideration to the recommendations of the Presidential Railroad Commission and Emergency Board 154, and to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation following the Emergency Board report. As a condition of its approval of any interim rule involving, directly or indirectly, the reduction of existing manning requirements or practices, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected as provided in section 5(2)(f) of the Interstate Commerce Act, and with due consideration to the recommendations of the Presidential Railroad Commission and Emergency Board 154 relating to the retention of job rights by senior employees, relocation expenses and earnings protection to less senior employees transferred to other jobs by the employing carrier, preferential hiring rights, displacement allowances, supplemental severance allowances, and retraining allowances. To the extent that provision for such payments and retraining may be available to an employee under the Manpower Development and Training Act of 1962 or other Federal statutes, the carrier will be relieved of this obligation.

SEC. 4. The Commission shall act upon any application filed with it under section 1 of this joint resolution, by way of approval, modified approval, or disapproval; and upon such approval or modified approval an interim rule consistent therewith shall be put into effect and shall remain operative until the parties reach agreement regarding the matter involved or, if no agreement is reached, for 2 years following the date the interim rule goes into effect.

SEC. 5. No change in rules coming within the scope of the notices referred to in section 1 of this joint resolution may be made except by agreement or by the procedures prescribed herein, and any strike or lockout to accomplish, prevent or interfere with such change shall be subject to the procedures of section 5(8) of the Interstate Commerce Act.

SEC. 6. The parties shall proceed immediately to bargain collectively, with the assistance of the National Mediation Board, concerning any unresolved issues regarding any proposals which were included in the notices of November 2, 1959, or September 7, 1960, but which do not involve the manning of train or engine crews and the protection of the interests of employees affected thereby. If agreement has not been reached within 60 days following the effective date of this joint resolution, any party may submit its proposal to the Interstate Commerce Commission for disposition by such special procedures, not confined to those set out

specifically in this joint resolution, as the Commission, after consultation with the parties, deems appropriate. Due consideration shall be given in any such procedure to the recommendations of the Presidential Railroad Commission and Emergency Board 154 and to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation. The provisions of section 5 of this joint resolution shall be applicable to matters covered by such proposals.

SEC. 7. The provisions of the act of March 23, 1932, entitled "An act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable to an action under sections 5 or 6. In any such action, service of the complaint and summons shall be made on the parties to the controversy by delivery thereof to an officer or to any other agent of said parties authorized by appointment or by law to receive service of process. The delivery of the summons and complaint may be made by certified mail. The orders, writs, and process of a district court issued in any such action shall run, be served, and be returnable anywhere in the United States.

SEC. 8. This joint resolution shall expire 2 years from the date it becomes effective: *Provided*, That the jurisdiction of a district court of the United States under sections 5 and 6 shall continue for so long as any interim rule under section 4 continues to be operative. Prior to such expiration, the President shall report on its operation to the Congress and make such further recommendations, if any, as he deems appropriate, including his recommendation as to whether this joint resolution should be extended. In addition, the Interstate Commerce Commission may, from time to time, submit interim reports to the President on its actions pursuant to this resolution.

REPORT TO THE PRESIDENT ON THE RAILROAD RULES DISPUTE

(By the special subcommittee of the President's Advisory Committee on Labor-Management Policy)

Washington, D.C., July 19, 1963

PRESIDENT'S ADVISORY COMMITTEE ON LABOR-MANAGEMENT POLICY,
Washington, D.C., July 19, 1963.

THE PRESIDENT,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: On July 10, 1963, you requested that this special subcommittee of your Advisory Committee on Labor-Management Policy immediately review and report to you the facts and issues of the railroad rules dispute and the respective positions of the carriers and the five brotherhoods. You specifically asked that we carry out this assignment in full consultation with the parties.

We have met with the parties to this dispute on a number of occasions since July 10. They have provided the subcommittee with statements which we have discussed with them. We also have reviewed with the parties a draft of our report and carefully considered their comments.

The report which we respectfully submit with this letter is one to which we unanimously subscribe. We believe that it fairly and accurately reflects the current posture of the case within the scope of this assignment.

Respectfully,

JOSEPH L. BLOCK.
G. E. LEIGHTY.
GEORGE MEANY.
STUART T. SAUNDERS.
W. WILLARD WIRTZ,
Chairman.
LUTHER H. HODGES,
Vice Chairman.

FACTUAL BACKGROUND

This dispute involves virtually all the Nation's major railroads and the five railroad operating brotherhoods. These five unions—the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen & Enginemen, the Order of Railway Conductors & Brakemen, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America—represent approximately 200,000 train and engine service employees, or about 27 percent of the railroad workers in the United States.

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The work rules and pay structure at issue have evolved over almost 100 years of railroad operation and collective bargaining. Both the carriers and the brotherhoods recognize a present need to modernize their assignment rules and methods of compensation. They differ sharply, however, as to which rules should be revised and the manner and timing by which changes should be made.

The present dispute had its formal beginning of November 2, 1959, when the carriers served notices of proposed changes on the brotherhoods. Substantial modifications were sought in many existing work rules and in the pay structure controlling the compensation of workers engaged in passenger, freight, and yard service.

Conferences on individual roads produced no agreement and, in June 1960, it was decided to handle the notices on a national basis. In September, the brotherhoods served notices on the railroads of proposed rules changes. Shortly thereafter, both parties, under the auspices of then Secretary of Labor James P. Mitchell, agreed that the magnitude of their respective demands was such that a special study commission should be created. By Executive order on November 1, 1960, President Eisenhower appointed a Presidential Railroad Commission of 15 members composed of an equal number of public, railroad, and brotherhood representatives.

For 13 months, from January 1961 through February 1962, the Commission conducted extensive hearings and detailed studies, and formulated its recommendations. The report, submitted February 28, 1962, for the most part rejected the carriers' demands for unilateral discretion over work assignments but recommended relaxation of the restrictions and requirements imposed by many existing rules and practices. A major revision of the pay structure was also recommended.

The carriers accepted the Commission's recommendations. The brotherhoods rejected most of them as unsatisfactory. Following unsuccessful negotiation and mediation the carriers announced on July 17, 1962, their intention to put into effect on August 16 new rules based upon recommendations of the Commission.

A period of litigation followed, during which the carriers were restrained from putting into effect any rule changes. After the Supreme Court determination¹ that the parties were free to exercise self-help, the carriers again announced that rules changes would be put into effect, and a nationwide rail tieup became imminent. The President, acting pursuant to the Railway Labor Act, established on April 3, 1963, a public board (Emergency Board No. 154) to make recommendations for the resolution of the dispute. Neither its recommendations, nor those of the previously established Presidential Railroad Commission, were to be binding upon the parties.

Following efforts to mediate the dispute, the Board issued its report on May 13, 1963. It recommended a series of guidelines and procedures designed to assist the parties in establishing the groundwork for constructive bargaining. The carriers accepted the recommendations. The brotherhoods indicated that the Board's proposals furnished a basis for subsequent negotiations but specifically rejected proposals for arbitration to settle unresolved issues.

Direct discussions between the parties proved unfruitful and on June 4 the Secretary and Assistant Secretary of Labor joined with the National Mediation Board in the negotiations. On June 15 the President requested the parties to extend the 30-day statutory status quo period until July 10 and they agreed to do so. After further intensive bargaining had not produced agreement, the Secretary of Labor made specific proposals for the disposition of two key issues relating to firemen and the consist (makeup) of train crews. The carriers accepted these proposals. The brotherhoods rejected them on the ground that they involved arbitration.

On July 9, the President proposed that the parties agree to submit all issues in dispute for final settlement to Associate Justice of the Supreme Court Arthur J. Goldberg. The carriers accepted this suggestion, and the brotherhoods rejected it on the basis that it provided for binding third-party settlement of unresolved issues.

On July 10, 8 hours before the time the carriers had set for the promulgation of their rules and the time the brotherhoods had set to strike, the President asked the parties, and they agreed, to maintain the status quo until July 29 in order to permit a subcommittee of the President's Advisory Committee on Labor-Management Policy to review and report to him, for transmittal to the Congress, the facts and issues in controversy and the respective positions of the parties.

¹ *Brotherhood of Locomotive Engineers et al. v. Baltimore and Ohio Railroad Co. et al.*, 372 U.S. 284 (Mar. 4, 1963).

ISSUES AND POSITIONS OF THE PARTIES

The issues in dispute include employment of firemen, consist of crews, inter-divisional runs, combination of road and yard service, manning of self-propelled machines, wage structure and fringe benefits, employment security, and training.

1. *Employment of firemen.*—Present rules require, with certain exceptions, that there be two men (an engineer and a fireman) in the cab of diesel passenger, freight, and yard locomotives. Typically, a "head-end" brakeman also rides in the cab of diesel road freight locomotives.³ The carriers by their notices sought the right to remove all firemen (except in passenger service), contending that the work traditionally performed by firemen has almost entirely disappeared or could be performed by other employees. The brotherhoods contended that firemen are essential for safe and efficient operations as well as for relief of engineers and for training future engineers.

The Presidential Railroad Commission concluded that firemen "are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels." It recommended that firemen with less than 10 years' seniority be separated from service, with various provisions for severance pay, retraining, and preferential hiring rights on other railroad jobs. Firemen with over 10 years' seniority were to be retained with full job rights.

In its report, the Emergency Board concluded that there should be determination, by bargaining and by neutral proceedings, if necessary, of "those situations, if any, which will continue to require the presence of a fireman in order to assure adequate safety, and to prevent placing an undue burden upon the remaining crew members." The Board suggested negotiating a procedure whereby positions could be eliminated as they became vacant but which would permit the brotherhoods to question the elimination on the grounds of safety or undue burden. Disagreements would be settled by local negotiations, or, failing agreement, by a special referee procedure. All firemen—except those hired recently or those working only irregularly—were to continue in the employ of the carriers although firemen with less than 10 years' seniority could be transferred to other comparable jobs with an earnings guarantee. For those electing to withdraw from service, educational scholarships, retraining allowances, and separation allowances were recommended.

In the post-Emergency Board negotiations, the brotherhoods made an offer to agree to a reduction in certain categories of jobs (on an attrition basis), which they estimated would include 5,500 such jobs of the approximately 32,000 firemen jobs in freight and yard service. The carriers rejected this offer for various reasons, among them that the conditions attached to it would reduce the number of jobs actually affected to only a few hundred.

The Secretary of Labor on July 5 suggested that the parties accept the recommendations of the Emergency Board, qualified by specific conditions, as a basis for the establishment of a general rule to be in effect for 2 years. During this 2-year period, a joint board (with neutrals to be added if necessary) would study the issue and the developing experience and make binding recommendations for ultimate disposition. This recommendation was accepted by the carriers but because it included a terminal arbitration clause the brotherhoods rejected it.

2. *Crew consist.*—Road and yard train service crews generally consist of one conductor and two brakemen. The carriers proposed a national rule to gain the unrestricted right to determine appropriate crew consists; the brotherhoods sought a national rule establishing one conductor and two brakemen as a minimum crew in all instances.

The Presidential Railroad Commission concluded that a national rule establishing a procedure for determining undermanning or overmanning of train crews was justified.

The Emergency Board recommended the negotiation of national guidelines based upon safety, efficiency, and avoidance of undue burden, with any disputes concerning the application of these guidelines to be resolved by local bargaining and a special referee procedure.

On the question of the crew consist, developments since the report of the Emergency Board have narrowed considerably the area of disagreement. Based upon a proposal made by the Secretary of Labor on June 19, both parties have agreed in principle to a procedure for handling the problem. However, the brotherhoods proposed to limit its application to crew consist situations which deviate from the generally prevailing pattern of one conductor and two brakemen. The carriers indicated that the brotherhoods' modification would be

³ The term "diesel" as used in this issue refers to other than steam-powered locomotives.

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acceptable if it did not apply to certain classes of service; they referred specifically to branch lines, secondary main lines, and main lines equipped with newly developed or automated control equipment. The carriers accepted, but the brotherhoods rejected, the July 5, 1963, proposal of the Secretary of Labor that the remaining differences be submitted to arbitration.

3. *Manning of motor cars and self-propelled vehicles.*—Motor cars and self-propelled vehicles are used in a variety of maintenance, repair, construction, and inspection operations.

The Commission and the Emergency Board recommended that the parties negotiate a rule which would eliminate (with certain exceptions) existing rules which require the use of engine, train, or yard service employees on, or in connection with, the operation of motor cars and self-propelled vehicles used in maintenance, repair, construction, or inspection work. Indications are that this matter may be settled if other issues are resolved.

4. *Interdivisional runs.*—Interdivisional runs extend over territories where more than one group of employees hold seniority rights. The carriers seek the unrestricted right to establish such runs and to effect the necessary related changes with provisions for an equitable distribution of earnings opportunities between affected employees and the negotiation of protective conditions.

The Commission recommended that the carriers be given the right, subject to a number of conditions designed to protect the interests of the employees to institute interdivisional runs, and the Emergency Board recommended the negotiation of guidelines within which the carriers would have the right to establish such runs. Recent discussions indicate that agreement may be reached once the manning issues (firemen and crew consist) and the compensation issues are resolved.

5. *Combination of road and yard work.*—Over the years a jurisdictional distinction has developed with respect to the work to which road service and yard service crews are entitled. Three problems have been posed by this distinction: extending switching limits; road crews performing work in yards; and the discontinuing of yard engine assignments. The carriers sought the elimination of restrictions affecting their operations in each of these areas. The brotherhoods maintained that any further combination of road and yard service should be prohibited unless sanctioned by local agreement.

The Commission found that present agreements concerning extending switching limits—agreements providing for arbitration—were working satisfactorily and should not be disturbed. However, it recommended that even where yard crews are on duty road crews should be permitted, subject to specific conditions to prevent abuse, to perform certain movement and switching operations in yards in connection with their own train. The Commission recommended that when a shift had less than 4 hours of yard engine assignment work for 10 consecutive days, it might be discontinued but that it must be restored according to the same formula.

The Emergency Board recommended the negotiation of a rule which would permit more flexible use of road and yard crews but which would preserve the basic distinctions reflected by separately existing seniority rights. Specific, negotiated rules to limit possible carrier abuse and to provide employee protection were also recommended.

The brotherhoods continue to maintain that this issue should be handled locally, while the carriers feel minimum criteria should be developed as suggested by the Emergency Board.

6. *Compensation (wage structure and fringe benefits).*—The industry's pay structure is one of extreme complexity. Many engine and train service employees' pay varies from day to day because of the interrelationship of a variety of factors such as a dual basis of pay (miles or hours), overtime, weight of the locomotive or length of train, higher than standard rates, and special allowances. Both parties sought to modernize the existing structure. In the aggregate, the carriers' proposals would have reduced their payrolls; the brotherhoods' proposals would have increased them.

The Commission found the present wage structure to contain "widespread anomalies and inequities" together with "unconscionable" disparities in hours on duty. A major revision of the wage structure was recommended and outlined in detail; continuous study by a standing joint committee was also proposed. In the fringe benefit area, the Commission recommended paid holidays and premium pay for holidays worked for certain employees, and "away-from-home" lodging or equivalent allowances. It declined to recommend a differential for nightwork.

The Emergency Board proposed two modifications of the Commission's recommendations: a full 2 percent of current payroll be used to work out adjustments

in the pay structure and provision be made to assure that "incumbent employees will not be unduly [adversely] affected by the structural changes."

The brotherhoods have indicated a willingness to discuss these issues. The carriers, having accepted the recommendations, take the view that further discussions on compensation issues cannot be undertaken until the firemen and other manning questions are resolved.

7. *Employment security.*—The brotherhoods proposed extensive protection for employees affected by technological change, mergers, consolidations, or similar actions. Their proposals incorporated financial and other protections including limitations on reductions in force.

The Commission recommended that separation allowances, retraining provisions, and preferential hiring for employees deprived of employment as a result of technological change be coupled with provisions permitting rail management to introduce such changes. Modifications in existing agreements necessary to accommodate innovation would be effected by negotiations, and, if necessary, arbitration.

The report of the Emergency Board did not address itself to this question. The carriers have expressed a willingness to protect employees adversely affected by technological changes so long as they are not impeded in instituting such changes. This committee has been informed that "the employee representatives advised [the Emergency Board] that in the interests of reaching an accord, if satisfactory settlement could be reached on all other matters in dispute, this proposal would be withdrawn."

8. *Training of engine service employees.*—Formal apprenticeship programs—which do not exist for operating employees—were requested by the brotherhoods for engine service employees.

In essence, both the Commission and the Emergency Board recommended that the parties should negotiate a training program to insure an adequate supply of qualified engine service employees. Discussion of this proposal has been largely deferred pending resolution of related manning issues.

APPENDIXES

APPENDIX A. STATEMENTS OF THE PRESIDENT

- A-1. Statement of July 10, 1963.
- A-2. Statement of July 9, 1963.
- A-3. Statement of June 15, 1963.

APPENDIX B. ORIGINAL NOTICES FOR CHANGES IN RULES FILED BY THE PARTIES

- B-1. Proposals of the carriers (November 2, 1959).
- B-2. Proposals of the organizations (September 7, 1960, with implementing proposals).

APPENDIX C. OFFICIAL REPORTS RELATING TO DISPUTE

- C-1. Report of the Presidential Railroad Commission, February 28, 1962.
- C-2. Report of Emergency Board No. 154, May 13, 1963.

(NOTE.—These reports are included as appendices to the report of the subcommittee transmitted to the President. The documents are a matter of public record and are not attached hereto.)

APPENDIX A

STATEMENTS OF THE PRESIDENT

APPENDIX A-1

[Release July 10, 1963—Office of the White House Press Secretary]

THE WHITE HOUSE.

STATEMENT OF THE PRESIDENT

In view of the unique and all-important nature of this labor-management dispute, I am asking a special six-man subcommittee of the Labor-Management Advisory Committee, to be composed of Joseph Block, George Harrison, George Meany, Stuart Saunders, Secretary of Labor as Chairman, the Secretary of Commerce as Vice Chairman, to undertake immediately, in full consultation with the parties, a comprehensive review and report limited to the facts and issues in this case and the respective positions of the parties.

This report will be transmitted to the Congress on July 22, 1963, with appropriate legislative recommendations from me which would be designed to dispose of the issues in this particular case.

After consultation with the congressional leaders, I am asking the parties to withhold any rules change or strike notice until July 29 to permit appropriate consideration of this matter, with the understanding that no further such request for a continuance will be made by this administration.

The railroads and the unions have accepted this proposal, and there will be no strike this evening.

APPENDIX A-2

[Release July 9, 1963—Office of the White House Press Secretary]

THE WHITE HOUSE.

STATEMENT BY THE PRESIDENT AS READ TO THE RAILROAD CARRIERS AND OPERATING BROTHERHOODS, THE WHITE HOUSE, JULY 9, 1963

I have been advised by the Secretary of Labor and the parties to the current railroad controversy that this dispute remains unresolved; that the carriers have served notice that they will put certain rules changes into operation, effective as of midnight tomorrow night; and that the unions have served notice that they will strike if this is done. In short, this Nation faces widespread economic disruption, dislocation and distress unless this dispute is settled by other means.

I continue to believe that this controversy can and should be settled by voluntary and peaceful processes.

It is essential that the particular issues in dispute be resolved. It is equally important that the freedom of collective bargaining be preserved.

It is obvious that the parties cannot reach agreement on the specific terms of settlement before the deadline which has now been set for midnight tomorrow. They can, however, agree voluntarily on a procedure for reconciling these differences.

Yesterday the Brotherhood of Railway Clerks, largest of the unions representing rail and airline employees, entered into a voluntary agreement with Pan American World Airways to submit to binding arbitration all disputes which cannot be settled by the full processes of negotiation, convinced that they can resort to "voluntary referral to a system of impartial adjudication rather than economic warfare without weakening collective bargaining."

The operating brotherhoods and the railroad carriers are equally free to avail themselves of similar voluntary settlement procedures. Such procedures are not substitutes for collective bargaining; they are part of such bargaining, to be used when the possibilities of negotiation have been exhausted.

It must be made clear, in this connection, that there has been no proposal for arbitration at any point in this case by any Government representative or board except after every effort has been made to get the parties to agree on specific settlement terms. These arbitration proposals have not reflected Government's desire or design; they have resulted solely from private failure or refusal or inability to agree.

I consider negotiated agreement infinitely superior to arbitration. But where private parties cannot negotiate successfully, arbitration is infinitely superior to a shutdown over a period of a vital segment of the Nation's economy.

I am convinced that an agreement now, in this case, to follow this course will be in the interest of the parties. I urge strongly that it be followed in the public interest—not only in maintaining continued rail transport but in preserving the freedom of private decisionmaking.

It is of vital importance that this most critical of all labor controversies end with the parties' agreement upon the procedure to be followed in resolving this dispute. The future of collective bargaining may well depend upon this being achieved.

I accordingly propose to the parties that they agree to submit all issues in dispute between them for final settlement to Associate Justice of the Supreme Court Arthur J. Goldberg, with the understanding that this matter will be completed before the convening of the next term of the Court. Mr. Justice Goldberg has previously made clear his intention to disqualify himself from any decisions coming before the Court which may arise out of this dispute. Although the use of a member of the High Court for additional duties has been and should be reserved for extraordinary situations—such as the Nuremberg trials and the Pearl Harbor inquiry—I believe this situation is extraordinary, in terms of its impact on collective bargaining, its relationship to the whole problem of technological unemployment and the potential effects of a nationwide rail strike on our economy, our defense effort, and our citizenry.

I urge the adoption of this proposal by both parties, with the understanding that the rules change and strike notices be immediately withdrawn.

I request the parties to advise me by 10 a.m., tomorrow, July 10, of their response to this proposal.

APPENDIX A-3

[June 15, 1963—Office of the White House Press Secretary]

THE WHITE HOUSE.

STATEMENT OF THE PRESIDENT

I am advised by the Secretary of Labor that you have reached no agreement. The report I have received indicates, beyond this, that there has actually been no real bargaining, in any effective sense, in this case—although it has gone on for almost three and a half years.

This means that in this vitally important case, involving great private interests and with the national welfare at stake, collective bargaining has failed—so far.

It means that in its most vital testing, the procedures established in the Railway Labor Act have failed—so far.

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I have supported free collective bargaining as a Member of the House of Representatives, as a Member of the Senate, and as President. I always will, for I consider it a keystone of private democracy. But it has to work.

I have always supported the Railway Labor Act, and its essential feature of recommendations that are to be the basis for bargaining, although the ultimate decision is up to the parties. I hope to be able to continue to support this act and this principle. But it must work, too.

This case has already dragged on much too long. There has been one postponement of the hour of showdown after another. Only the critical, crucial nature of the basic issues involved—especially the replacement of men by technology—justifies this at all. But there have been two Presidential Board recommendations concerning these issues. It should be possible to find a solution which permits the termination of jobs which are not justified and protects the equities of the men involved.

It is clear, at the same time, that the whole future of free collective bargaining, and of the effectiveness of the Railway Labor Act as a supplement to free bargaining, is involved here. If no settlement is reached in this case, there will be no alternative to the enactment of new legislation which will protect the public against a loss of its rail transport. The effect of such legislation on free collective bargaining will be incalculable.

I therefore propose that you make one last major effort to resolve this dispute, not just as parties to this one case, but as stewards of the free bargaining tradition.

I ask that you proceed immediately to the hardest kind of bargaining with the assistance of the Secretary of Labor, Assistant Secretary Reynolds, and the National Mediation Board.

If by July 10 there has still been no accord reached, I shall ask for an immediate report from the Secretary of Labor and from you on the circumstances of this failure. I shall then make such recommendations to the Congress as these circumstances appear to dictate.

I request that you agree to maintain the status quo to permit the completion of this proposed procedure.

I point out, in conclusion, these plain facts. If this case does have to go to the Congress, it is going to mean, necessarily, the disposition of the disputed issue or issues through some agency other than the parties. There is nothing which legislation can do which you are not free to do voluntarily, including the selection of your own special procedures if this is necessary to complete any part of your settlement. If either or both of you should decline to take advantage of this opportunity, the responsibility for what follows will have to be accepted where it lies.

I urge you to act, as it is in your power to act, not only to settle this case but to preserve the freedom of private collective bargaining and the effectiveness of the established statutory procedures.

APPENDIX B

ORIGINAL NOTICES FOR CHANGES IN RULES FILED BY THE PARTIES

APPENDIX B-1

PROPOSALS OF THE CARRIERS

USE OF FIREMEN (HELPERS) ON OTHER THAN STEAMPOWER

A. Eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of train, engine, or yard service employees, which require the employment or use of firemen (helpers) on other than steampower in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous services to which mileage rates do not apply).

B. Establish a rule to provide that—

1. Management shall have the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steampower in all classes of freight service (including all mixed, miscellaneous, and unclassified services) and in all classes of yard service (including

all transfer, belt line, and miscellaneous services to which mileage rates do not apply).

2. All agreements, rules, regulations, interpretations, and practices, however established, which conflict with the provisions of paragraph 1 of this rule shall be eliminated.

BASIS OF PAY AND ASSIGNMENT OF EMPLOYEES

Basis of pay

A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of train, engine, yard, or hostling service employees, which—

(i) Provide for rates or bases of pay, daily earnings minimums, minimum daily earnings or daily, weekly, or monthly earnings guarantees,

(ii) Provide for arbitrary payments, or special or constructive allowances, which conflict with the payment of single time in miles or hours from the time called to report for duty until released from duty, or

(iii) Impose restrictions on weekly, monthly, or annual earnings through the limitation of miles run or paid for, hours worked or paid for or compensation received.

B. Establish a rule to provide that—

1. Train and engine service employees used in road service, including all miscellaneous and unclassified services, shall be paid single time in miles or hours, whichever is greater, from the time called to report for duty until released from duty at the end of the trip or tour of duty, as follows:

(a) All road miles actually run during each trip or tour of duty shall be paid for at the rates provided in paragraph 3 of this rule; or

(b) All time on duty shall be paid for on a minute basis at the straight-time hourly rates provided by paragraph 3 of this rule, except that (i) In freight service, overtime shall be paid for at $1\frac{1}{2}$ times each straight time hourly rates. In assigned local freight service, overtime shall begin when the time on duty exceeds the miles run divided by $12\frac{1}{4}$, and in all other classes of freight service (including miscellaneous and unclassified services) overtime shall begin when the time on duty exceeds the miles run divided by 20; but in any case overtime shall not accrue until the expiration of 8 hours from time of first reporting for duty; and (ii) On short turnaround passenger runs, no single trip of which exceeds 80 miles, including suburban and branch line service, time shall be paid on the minute basis at straight-time hourly rates for all time actually on duty, or held for duty, in excess of 8 hours (computed on each run from the time required to report for duty to the end of that run) within 9 consecutive hours; and also for all time in excess of 9 consecutive hours computed continuously from the time first required to report to the final release at the end of the last run. Time shall be counted as continuous service in all cases where the interval of release from duty at any point does not exceed 1 hour. For calculating time paid for as provided herein, the management may designate the initial trip.

2. Train and engine service employees used in yard service, including transfer, belt line, hostling, and all miscellaneous services to which mileage rates do not apply, shall be paid single time, from the time called to report for duty until released from duty, at the straight time rates provided in paragraph 3 of this rule; except that under circumstances where existing rules provide for the payment of overtime at $1\frac{1}{2}$ times the hourly rate, such payments shall be continued at $1\frac{1}{2}$ times the hourly rates provided in paragraph 3.

3. Mileage and straight time hourly rates of pay shall be as follows:

NOTE.—The mileage and straight time hourly rates to be provided in this paragraph 3 shall be determined by multiplying standard mileage and pro rata hourly rates currently paid under existing agreements immediately prior to the effective date of this proposed rule by the conversion factors set forth in the following table. For classes and grades of service where rates of pay are graduated, the rate paid in the weight on drivers or car scale rate bracket specified in column (2) of the table shall be used in computing the new single rates.

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PASSENGER SERVICE OTHER THAN SHORT TURNAROUND

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket.	Conversion factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Engineers and motormen.....	450,000 to 499,999 pounds....	0.625	1.6
Firemen and helpers.....	Less than 80,000 pounds.....	.625	1.6
Conductors.....		.667	1.667
Assistant conductors and ticket collectors.....		.667	1.667
Baggagemen.....	Minimum rate.....	.667	1.667
Brakemen and flagmen.....		.667	1.667

SHORT TURNAROUND PASSENGER SERVICE

Engineers and motormen.....	170,000 to 199,999 pounds....	0.6416	1.0
Firemen and helpers.....	Less than 80,000 pounds.....	.625	1.0
Conductors.....		.667	1.0
Assistant conductors and ticket collectors.....		.667	1.0
Baggagemen.....	Minimum rate.....	.667	1.0
Brakemen and flagmen.....		.667	1.0

ASSIGNED LOCAL FREIGHT SERVICE

Engineers and motormen.....	250,000 to 299,999 pounds....	1.0	1.0
Firemen and helpers.....	Less than 140,000 pounds....	1.0	1.0
Conductors.....	Less than 81 cars.....	1.0	1.0
Brakemen and flagmen.....	Less than 81 cars.....	1.0	1.0

THROUGH FREIGHT SERVICE

Engineers and motormen.....	750,000 to 799,999 pounds....	0.625	1.0
Firemen and helpers.....	Less than 140,000 pounds....	.625	1.0
Conductors.....	106 to 125 cars.....	.625	1.0
Brakemen and flagmen.....	106 to 125 cars.....	.625	1.0

NOTE.—Under circumstances where existing rules provide for conversion from through to local freight rates, the following amounts shall be added to the above mileage and hourly rates:

(a) Engineers, motormen and conductors—0.35 cent to the mileage rates and 7 cents to the hourly rates.

(b) Firemen and helpers—0.25 cent to the mileage rate and 5 cents to the hourly rate.

(c) Brakemen and flagmen—0.26875 cent to the mileage rate and 5.375 cents to the hourly rate.

OTHER FREIGHT SERVICE (INCLUDING ALL MISCELLANEOUS AND UNCLASSIFIED SERVICES)

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket.	Conversion factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Engineers and motormen.....	250,000 to 299,999 pounds....	0.625	1
Firemen and helpers.....	Less than 140,000 pounds....	.625	1
Conductors.....	Less than 81 cars.....	.625	1
Brakemen and flagmen.....	Less than 81 cars.....	.625	1

NOTE.—The conversion factor shall be applied to the standard through freight rate paid in the bracket specified.

**YARD, TRANSFER, BELT LINE AND ALL MISCELLANEOUS SERVICES TO WHICH
MILEAGE RATES DO NOT APPLY**

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket.	Conversion factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Engineers and motormen.....	200,000 to 240,000 pounds.....	.....	.....
Firemen and helpers.....	Less than 140,000 pounds.....	.....	.....
Conductors and foremen.....	.....	.....	.....
Brakemen and helpers.....	.....	.....	.....
Switchtenders.....	.....	.....	.....
Outside hostlers.....	.....	.....	.....
Inside hostlers.....	.....	.....	.....
Outside hostler helpers.....	.....	.....	.....
Car retarder operators.....	.....	.....	.....

NOTE.—Where the 5-day workweek is in effect, the factors set forth above shall be applied to currently applicable 5-day workweek rates. Where this 5-day workweek is not in effect, such factors shall be applied to currently applicable (or basic) rates covering other than 5-day workweek service. Where existing rules provide for paid holidays, 4 cents per hour shall be deducted from the rates derived by such application of the foregoing factors.

4. Minimum earnings from all sources for each tour of duty, from the time called to report for duty until finally released, including aggregate service for which payment is made on a continuous time basis, shall not be less than pay for 5 hours at straight time rates in passenger engine service (other than short turnaround); $7\frac{1}{2}$ hours at straight time rates in passenger train service (other than short turnaround), and 8 hours at straight time rates in short turnaround passenger engine and train service, and in all classes of freight and yard engine and train service, including miscellaneous and unclassified services.

5. Compensation for time held at away from home terminal, deadheading, attending court, and attending investigations shall be paid under existing rules (if any) at the rates provided in paragraph 3 of this rule or at a fractional part thereof as may in each case be provided by existing rules.

6. All agreements, rules, regulations, interpretations, and practices, however established, which conflict with the foregoing provisions of this rule shall be eliminated; and no employee paid pursuant to the provisions of this rule shall receive any other or additional compensation for any service performed during his tour of duty; *Provided*, That existing rules and practices considered by the carrier to be more favorable are preserved.

Road train and engine service assignments

A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees, which—

(i) Prohibit or impose restrictions on the right of the carrier to establish, move, consolidate, or abolish crew terminals, or merge or consolidate seniority districts;

(ii) Prohibit or impose restrictions on the establishment or operation of interdivisional, interseniority district, intradivisional or intraseniority district runs;

(iii) Prohibit or provide penalties for running crews through established crew terminals; or

(iv) Provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

B. Establish a rule to provide that—

1. The carrier shall have the right to establish, move, consolidate, and abolish crew terminals, to merge and consolidate seniority districts and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one-way or turnaround (including short turnaround) basis and through established crew terminals. The right to operate such runs as may be established under the provisions of this rule will be free of the im-

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position of any restrictions as to class of traffic which may be handled or as to the origin or destination of any empty or loaded cars moving on such runs; and such service shall be paid for at the rates provided in paragraph 3 of the basis-of-pay rule.

2. No rule, regulation, interpretation, or practice, however established, shall be construed to in any way prohibit, restrict, or limit the provisions of paragraph 1 of this rule except as provided in subparagraphs (a) and (b) of this paragraph 2.

(a) The carrier shall distribute the mileage ratably as between employees from the seniority districts affected.

(b) Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees, and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman of its intention to establish such run and the carrier and the general chairman shall endeavor to agree within 30 days upon such other conditions not inconsistent or in conflict with the provisions of paragraph 1 of this rule upon which such proposed run shall be established. In the event the carrier and the general chairman cannot so agree on the matter within 30 days, then the dispute will be submitted to arbitration in accordance with the procedure provided for in sections 7 and 8 of the Railway Labor Act, as amended, with the limited authority to decide what conditions shall be met under this subparagraph (b) by the carrier, if and when such run is established.

3. All agreements, rules, regulations, interpretations, and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved.

Combination of road and yard service

A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of train, engine, yard, or hostling service employees, which—

(i) prohibit or impose restrictions upon the use of passenger crews to perform switching or station work in connection with the cars of their own trains, or to handle the light engine or engines of their own trains,

(ii) prohibit or impose restrictions upon the use of road crews in other than passenger service to perform any and all switching and station work, whether or not such switching or station work is in connection with the cars of their own trains, or to handle the light engine or engines of their own trains,

(iii) prohibit or impose restrictions upon the use of yard crews to perform road work, or to perform service outside of switching limits,

(iv) provide for arbitrary payments, special or constructive allowances or penalty payments to any employee, or class or grade of employees, when road or yard crews perform any of the work described above, or

(v) prohibit or impose restrictions on the right of management to designate or change switching limits or to establish or abolish yard or hostling service or yard or hostling service assignments.

B. Establish a rule to provide that—

1. Passenger crews will perform any and all switching and station work in connection with the cars of their own trains as may be required of them at their initial and final terminals and at all intermediate points, including the clearing of any track or tracks and the shoving and coupling of cars on any track for the purpose of handling the cars of their own trains, and the handling of the light engine or engines of their own trains; and in the performance of such work will handle cars of other than their own trains as may be required, including the respotting of displaced cars. Road crews in other than passenger service will perform any and all switching and station work as may be required of them at their initial and final terminals and at all intermediate points, including the handling of the light engine or engines of their own trains, whether or not such switching and station work is in connection with cars of their own trains. When switching or station work is performed by road crews as provided herein, such work shall be paid for as a part of the road day or trip and additional compensation for such work shall not be paid under either road, yard, or hostling rules or regulations. The provisions of this paragraph 1 shall apply whether or not yard crews, yard men, or hostlers are on duty when and where the work is performed.

2. Yard crews, where employed, may be required to perform both road and yard service; and where switching limits are established yard crews may be required to perform service outside of such switching limits. When service is performed by a yard crew as provided herein, such work shall be paid for as part of the yard day or tour of duty and additional compensation shall not be paid for such work under either road or yard rules or regulations. The provisions of this paragraph 2 shall apply whether or not road crews are available when and where the work is performed.

3. When road crews perform switching or station work or handle the light engine or engines of their trains as provided in paragraph 1 of this rule, neither yard crews, yard men, nor hostlers shall be entitled to any penalty pay or other compensation; nor shall road crews be entitled to any penalty pay or other compensation when yard crews perform road work or perform service beyond switching limits as provided in paragraph 2.

4. Management shall have the exclusive right to designate and change switching limits, and to establish and abolish yard and hostling service and yard hostling service assignments.

5. All agreements, rules, regulations, interpretations, and practices, however established, which conflict with the foregoing shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved.

CONSIST OF CREWS

Consist of road and yard crews

A. Eliminate all agreements, rules, regulations, and practices, however established, applicable to any class or grade of train, engine, or yard service employees, which require the employment or use of—

(i) A stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) or more than one conductor in any crew used in any class of road service, including all miscellaneous and unclassified services,

(ii) A stipulated number of brakemen or helpers or more than one conductor or foreman in any crew used in any class of yard, transfer, or belt line service, including all miscellaneous services to which mileage rates do not apply, or

(iii) A conductor or trainman in connection with the movement of light engines or in pusher or helper service, or an engineer, conductor, or trainman in pilot service.

B. Establish a rule to provide that—

1. Management shall have the unrestricted right, under any and all circumstances, to determine when and if trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) shall be used in each crew employed in all classes of road service, including all miscellaneous and unclassified services, and if used the number and classification of employees who will be so used; and when and if brakemen or helpers shall be used in each crew employed (including yardmen who work independent of a yard crew) in all classes of yard, transfer, and belt line service, including all miscellaneous services to which mileage rates do not apply, and if used, the number and classification of employees who will be so used.

2. Management shall also have the unrestricted right, under all circumstances, to determine when and if more than one conductor shall be used in any crew employed in any class of road service, including all miscellaneous and unclassified services; and when and if more than one conductor or foreman shall be used in any crew employed in any class of yard, transfer or belt line service, including all miscellaneous services to which mileage rates do not apply; and when and if a conductor, trainman, or yardman will be used in connection with the movement of light engines and in helper and pusher service, and when and if an engineer, conductor, trainman, or yardman will be used in pilot service.

3. All agreements, rules, regulations, interpretations, and practices, however established, which conflict with the provisions of this rule shall be eliminated.

Manning motor cars and self-propelled machines

A. Eliminate all agreements, rules, regulations, interpretations, and practices, however established, which require the use of engine, train, or yard service employees in any capacity on (or in connection with the operation or use of) any

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motor car or self-propelled roadway or shop equipment or machine used in maintenance, repair, construction or inspection, work, whether operated on tracks or otherwise.

B. Establish a rule to provide that—

1. Engine, train, and yard service employees shall have no claim to man or to be called to work in any capacity on or in connection with the use or operation of inspection motorcars used by company officials, or motor cars operated with or without trailer cars and used by telegraph, telephone, or company forces in the performance of maintenance, construction, or inspection work, or self-propelled roadway or shop equipment or machines used in repair, construction, or maintenance work, such as (this enumeration being by way of illustration and not by way of limitation) track motorcars operated with or without trailers, inspection motorcars, locomotive cranes, ditchers, clamshells, piledrivers, scarifiers, wrecking derricks, weed burners, rail detector cars, and all other self-propelled roadway and shop equipment and machines, whether operated on tracks or otherwise, or with or without cars.

2. Management shall have the unrestricted right, under all circumstances, to determine when and if engine, train, and yard service employees shall be used on motorcars and self-propelled roadway and shop equipment and machines, as described in paragraph 1 of this rule; and to determine the number and classification of such employees when so used. If an engine, train or yard service employee is so used, he will be paid the rates and under the rules applicable to work train service; and in such case, each day such service is performed the time of the employee used shall be computed from the time he is required to report for duty until he is released from duty at the point where he is so relieved.

3. All agreements, rules, regulations, interpretations, and practices, however established, which conflict with the provisions of this rule shall be eliminated.

APPENDIX B-2

PROPOSALS OF THE ORGANIZATIONS

Notice of September 7, 1960

A. Negotiate agreements providing for the following:

1. Improvements in the existing wage structure including but not limited to provision for adequate compensation for nightwork and shift differentials, daily, weekly, and monthly guarantees, payment for time held away from home and improved overtime rules.

2. Consist of crews including engineers (motormen), firemen (helpers), conductors, brakemen, hostlers, hostler helpers, yard conductors (foremen) and yard brakemen (helpers), the adequacy of the number of men in the crew and their qualifications and training.

3. Financial and other protection of employees affected by mergers, consolidations, abandonments, technological changes in operations, or by changes in working conditions.

4. Stabilization of employment.

B. Establish a commission to function in general conformity with the recommendation of Emergency Board No. 109 to investigate and report respecting the changes requested above and your notices of November 2, 1959, with the view of assisting the parties to arrive at an agreement.

EMPLOYEE IMPLEMENTING PROPOSALS

I. WORK DAY AND WORK MONTH

A. Through freight service—Engine and train service employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the workday and work month with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers or cars hauled, except that mileage rates shall be maintained.

Basic day—Basic unit.—Six hours or less, 100 miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that 6 hours shall

constitute a basic day, 100 miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

Workmonth.—The work month shall consist of 26 calendar days with 4 days off at home terminal each 30 days, off days to be assigned in assigned service and, where possible, in pool and unassigned service.

B. Straightaway passenger service—Engine and train service employees

Establish or amend rules, regulations, or agreements relating to hours of service and rates of pay to provide the following standards for the workday and workmonth with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers, except that mileage rates shall be maintained.

Basic day—Basic unit.—(a) Engineers and firemen: 4 hours or less, 100 miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that 4 hours shall constitute a basic day, 100 miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

(b) Conductors and trainmen: 6 hours or less, 150 miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that 6 hours shall constitute a basic day, 150 miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

Workmonth.—The workmonth shall consist of 26 calendar days with 4 days off at home terminal each 30 days, offdays to be assigned in assigned service and, where possible, in pool and unassigned service.

II. WORKDAY AND WORKWEEK

A. Short turnaround passenger service

1. *Train service employees.*—Establish or amend rules, regulations, or agreements relating to hours of service and rates of pay to provide the following standards for the workday and workweek with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, except that mileage rates shall be maintained.

Basic day—Basic unit: 7 hours or less, 150 miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that 7 hours shall constitute a basic day, 150 miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

Workweek: The workweek shall consist of 5 consecutive workdays with 2 consecutive assigned days off at home terminal each 7 days.

Hours of service paid for at the time-and-one-half rate during any 24-hour period or trip in the workweek shall not be used in computing the workweek.

The workweek of any employee shall be considered as starting on the first day of any calendar week in which he renders service.

NOTE.—Short turnaround passenger service for train service employees is service no single trip of which exceeds 80 miles, including suburban and branch line service.

2. *Engine service employees.*—Establish or amend rules, regulations, or agreements relating to hours of service and rates of pay to provide the following standards for the workday and workweek with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers, except that mileage rates shall be maintained.

Basic day—Basic unit: 7 hours or less, 100 miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that 7 hours shall constitute a basic day, 100 miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

Workweek: The workweek shall consist of 5 consecutive workdays with 2 consecutive assigned days off at home terminal each 7 days.

Hours of service paid for at the time and one-half rate during any 24-hour period or trip in the workweek shall not be used in computing the workweek.

The workweek of any employee shall be considered as starting on the first day of any calendar week in which he renders service.

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NOTE.—Short turnaround passenger service for engine service employees is service on single trip of which exceeds 80 miles, including suburban and branch line service.

B. All other classes of road service—Engine and train service employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the workday and workweek with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers or cars hauled, except that mileage rates shall be maintained.

Basic day—Basic unit: 7 hours or less, 100 miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that 7 hours shall constitute a basic day, 100 miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

Workweek: The workweek shall consist of 5 consecutive workdays with 2 consecutive assigned days off at home terminal each 7 days.

Miles or hours of service paid for at the time and one-half rate during any 24-hour period or trip in the workweek shall not be used in computing the workweek.

The workweek of any employee shall be considered as starting on the first day of any calendar week in which he renders service.

C. Yard, belt line, transfer, and hostler service—Engine and yard service employees

Establish or amend rules, regulations, or agreements relating to hours of service and rates of pay to provide the following standards for the workday and workweek with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers. Wage adjustments accompanying past reductions in the workweek of yard employees shall be completely resurveyed to correct any remaining conversion inequities.

Basic day.—Seven hours or less shall constitute a basic day. (This is intended to mean that employees shall be paid not less than the applicable daily rate whenever assigned, called, or used.)

Workweek.—The workweek shall consist of 5 consecutive workdays with 2 consecutive assigned days off each 7 days.

All time paid for at the time and one-half rate during any 24-hour period in the workweek shall not be used in computing the workweek.

The workweek of any employee shall be considered as starting on the first day on which he is assigned to render service after 2 consecutive days off.

III. OVERTIME

A. Through freight and straightaway passenger service—Engine and train service employees

Compensation at $1\frac{1}{2}$ times the applicable hourly or mileage rate shall be paid for miles run or time on duty, whichever is greater:

1. After the expiration of the hours constituting the basic day.
2. Outside the regular assignment, whether or not within the hours covered by the regular assignment.
3. On any off day.

NOTE.—For the purpose of applying subparagraph 3 of this rule, the day on which a trip or tour of duty commences shall govern.

B. Short turnaround passenger service—Engine and train service employees

Compensation at $1\frac{1}{2}$ times the applicable hourly rate shall be paid for all time actually on duty, or held for duty—

1. In excess of 7 hours (computed on each run from time required to report for duty to the end of that run) within 9 consecutive hours; and also for all time in excess of 9 consecutive hours computed continuously from the time first required to report to the final release at the end of the last run. Time shall be counted as continuous service in all cases where the interval of release from duty at any point does not exceed 1 hour. This rule applies regardless of mileage made.
2. Outside the regular assignment, whether or not such service is performed within the hours covered by the regular assignment.
3. On the sixth or seventh day of any workweek.

C. All other road service—Engine and train service employees

Compensation at $1\frac{1}{2}$ times the applicable hourly or mileage rate shall be paid for miles run or time on duty, whichever is greater:

1. After the expiration of the hours constituting the basic day.
2. On any second assignment, call, or unit of work beginning within the calendar day in which the first unit of work started, or within 10 hours of the conclusion of the first unit of work, if that unit overlaps a calendar day.
3. Outside the regular assignment, whether or not within the hours covered by the regular assignment.
4. On the sixth or seventh day of any workweek.

D. Yard, belt line, transfer and hostler service—Engine and yard service employees

Compensation at $1\frac{1}{2}$ times the applicable hourly rate shall be paid for time on duty or held for duty:

1. After the expiration of the hours constituting the basic day.
2. On any assigned off (relief) day.
3. Outside the regular assignment, whether or not within the hours covered by the regular assignment.
4. To regular and extra employees working a second shift in a 24-hour period.

IV. GUARANTEES

Apply to all regular and extra employees the following guarantees:

A. Engine service employees

Establish or amend rules, regulations, or agreements to provide:

1. *Through freight and straightaway passenger service.*—Engineers (motormen) and firemen (helpers) shall be guaranteed not less than the pay for 26 basic days per month, exclusive of overtime and other compensation, at the average of graduated rates of pay applicable to the service in which engaged.

2. *Short turnaround passenger service.*—Engineers (motormen) and firemen (helpers) shall be guaranteed not less than the pay for 5 basic days per week and 22 basic days per month, exclusive of overtime and other compensation, at the average of graduated rates of pay applicable to the service in which engaged.

3. *All other classes of road service.*—Engineers (motormen) and firemen (helpers), other than those set forth in subparagraphs 1 and 2, shall be guaranteed not less than the pay for 5 basic days per week and 22 basic days per month, exclusive of overtime and other compensation, at the average of graduated rates of pay applicable to the service in which engaged.

4. *Yard, belt line, transfer, and hostler service.*—Engineers (motormen), firemen (helpers), hostlers, and outside hostler helpers shall be guaranteed not less than the pay for 5 basic days per week and 22 basic days per month, exclusive of overtime and other compensation, at the rate or average of graduated rates of pay applicable to the service in which engaged.

NOTE 1.—An employee shall receive the pro rata of the monthly guarantee, or guarantees, according to the class and grade of service in which engaged and workdays he is available during the month in the application of the foregoing provisions.

NOTE 2.—This shall not be construed as revising or abrogating daily, weekly, or monthly guarantees which are considered by the employees to be more favorable on individual carriers.

B. Train and yard service employees

Establish or amend rules, regulations, or agreements to provide:

1. *Through freight and straightaway passenger service.*—All employees shall be guaranteed not less than the pay for 26 basic days per month, exclusive of overtime and other compensation, at the rate or average of graduated rates of pay applicable to the service in which engaged.

2. *Short turnaround passenger service.*—Conductors and trainmen shall be guaranteed not less than the pay for 5 basic days per week and 22 basic days per month, exclusive of overtime and other compensation.

3. *All other classes of road service.*—Employees other than those set forth in subparagraphs 1 and 2, shall be guaranteed not less than the pay for 22 basic days per month, exclusive of overtime and other compensation, at the rate or average of graduated rates of pay applicable to the service in which engaged.

4. *Yard, belt line, and transfer service.*—All employees shall be guaranteed not less than the pay for 5 basic days per week and 22 basic days per month, exclusive

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of overtime and other compensation, at the rate of pay applicable to the service in which normally engaged.

NOTE 1.—An employee shall receive the pro rata of the monthly guarantee, or guarantees, according to the class and grade of service in which engaged and workdays he is available during the month in the application of the foregoing provisions.

NOTE 2.—This shall not be construed as revising or abrogating daily, weekly, or monthly guarantees which are considered by the employees to be more favorable on individual carriers.

V. SPLIT TRIP COMPENSATION

Establish rules to provide:

A. In short turnaround passenger service any assignment with an interval of release of more than 1 hour shall be considered a split trip and shall be paid additional half time for all time in excess of a spread of 10 hours, computed from the time of first reporting for duty until time of final release, in addition to all straight time, overtime, and other compensation otherwise provided.

B. In any other road service any assignment or combination of assignments having one or more intervals of release of less than 10 hours within or between such assignments shall be considered split trips. In addition to all other compensation, additional half time shall be paid on such split trips for all time in excess of 10 hours between the time of first reporting for duty and final release.

NOTE.—This shall not be construed as revising or abrogating the provisions of automatic release rules, regulations, or agreements, however established.

VI. DIFFERENTIAL FOR NIGHT WORK

Establish rules to provide:

Employees in all classes of service shall be paid at 10 percent of the applicable hourly rate (based on weight on drivers or cars hauled, where applicable) for all time on duty between the hours of 6 p.m. and 6 a.m., in addition to all other compensation.

NOTE.—This shall not be construed as revising or abrogating the provisions of the starting time rules, regulations, or agreements, however established.

VII. ARBITRARIES AND SPECIAL ALLOWANCES

Revise rules, regulations, and agreements establishing arbitraries and special allowances so that their equivalent shall be expressed in hours or minutes, which shall in the future be adjusted with basic hourly rates. Conversion from money or mileage to time equivalent shall be on an equitable basis but at not less than the relationship existing November 1, 1959.

VIII. HOLIDAYS WITH PAY

Establish or amend rules, regulations, or agreements to provide that all employees shall be allowed holiday pay equivalent to 1 basic day at the rate for the class of service in which last engaged for each of the following holidays:

New Year's Day	Memorial Day	Veterans' Day
Washington's Birthday	Independence Day	Thanksgiving
Good Friday	Labor Day	Christmas

Employees assigned, called or used on any such holiday shall be paid their holiday allowance as specified above and in addition thereto shall be paid at the rate of time and one-half for all services performed with a minimum of $1\frac{1}{2}$ times the rate for the basic day. Employees who have heretofore allocated part of their wage increases to be paid as though for holidays will have the amount thus allocated restored to their basic rates.

IX. AWAY-FROM-HOME TERMINAL EXPENSE

Establish or amend rules, regulations or agreements to provide that employees required to lay over at any point other than their home terminal shall be allowed for expenses incurred during such layover, 1 hour's pay for layovers of 4 hours or less; 1 hour's pay for the next 4 hours or less; and 2 hours' pay for the next 5 hours or less, such hourly pay to be computed at the rate of the last service performed. These payments to be cumulative, to be repeated for each 24-hour period of any layover, and to be in addition to all other compensation.

X. MINIMUM SAFE CREW CONSIST

Establish rules or agreements to provide:

A. Crews in all classes of road train service shall consist of not less than one conductor and two trainmen and such additional employees as are required to assure maximum safety.

B. Train and yard crews in yard, belt line, and transfer service shall consist of not less than one conductor (foreman) and two brakemen (helpers) and such additional employees as are required to assure maximum safety.

C. Crews in all classes of engine service shall consist of not less than one engineer (motorman) and one fireman (helper) and such additional employees as are required to assure maximum safety.

XI. QUALIFICATION AND TRAINING FOR SERVICE-ENGINE SERVICE EMPLOYEES

Establish a uniform, progressive training program for locomotive helpers and apprentice engineers including training in the operation, maintenance, and inspection (en route or in service) of all types of motive power and in safety of operations, jointly administered, as set forth in appendix A. (See employees exhibit No. 1.)

NOTE.—Progression under the training program shall be in the order set forth below:

1. Locomotive helper (trainee).
2. Locomotive helper.
3. Locomotive helper (apprentice engineer).
4. Locomotive engineer.

XII. PROHIBITION FROM COMBINING SERVICES

Further combination of road and yard service shall be prohibited and nothing in these proposals shall be otherwise construed.

XIII. IMPLEMENTATIONS

Implementations of the foregoing rules in reference to exceptional situations, where necessary, may be made by agreement on individual properties.

XIV. FINANCIAL AND OTHER PROTECTIONS

The following provisions shall apply, in all instances in which the Washington agreement of May 1936, is not applicable, to all mergers, consolidations, unifications, or abandonments of facilities, or technological changes in operations, or changes in home terminals, home locations, or other rearrangements or changes in operations or employee assignments, designed to or resulting in reduction of forces, displacement, loss of compensation, or changed working conditions (hereinafter referred to as "effected change"), whether on any one carrier or more than one carrier.

A. The number of employees in the service of the carrier shall not be reduced below the number in compensated service during the month of June 1960, after deducting the number who have been removed from the payrolls after the effective date of this agreement as a result of death, normal retirements, or voluntary resignation, but not more in any 1 year than 5 percent of the number in compensated service during June 1960.

B. 1. No employee shall be placed in a worse position with respect to compensation, rules, working conditions, or benefits than he occupied at the time of the effected change so long as he is unable in the normal exercise of his seniority rights under the existing collective bargaining agreement and under all related practices in effect to obtain a position producing compensation and related conditions and benefits equal to or exceeding those of the position held by him at the time of the effected change; *Provided, however,* That if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under said agreement, supplements, and practices which carry rates of pay, compensation, conditions and benefits exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

2. The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

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3. ~~Event~~ displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee during the highest year out of the last 5 years and his total time paid for during said year in which he performed service immediately preceding the date of his displacement (such year being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, and he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

4. The protection afforded herein shall only apply to displacements occurring within a period of 5 years from the effective date of the effected change (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 5 years from the date on which the employee is displaced.

C. 1. Any employee who is required to change the point of his employment and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, used in securing a place of residence in his new location.

2. The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is required to move his place of residence:

(a) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value or original cost whichever is higher. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the effected change to be unaffected thereby. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party. If housing at the new location is more costly, fair value shall represent the cost of comparable housing at the new location.

(b) If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

(c) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

Changes in place of residence subsequent to the initial change which grew out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

No claim for loss shall be paid under the provisions of this section which is not presented within 5 years after the effective date of the employee's displacement.

Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conferences between the representatives of the employees and the carriers, and, in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner; one to be selected by the organization representing the employees and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

D. No employee shall be deprived of benefits due him under any provisions of the existing collective bargaining agreement or of any related practices providing

conditions or benefits, including (but not limited to) hospitalization and medical benefits, pensions, free transportation, etc., under the same conditions, for the same period, and to the same extent to which such benefits or conditions are available to employees who have not been affected by the effected change.

E. Appropriate provisions shall be made for the following:

1. Dispute committee or other procedure for the handling of disputes, controversies or grievances arising under the foregoing.
2. Protection relating to disciplinary procedure and physical examination.

XV. STABILIZATION OF EMPLOYMENT

Any employee who has had compensated service in 8 or more months in any calendar year, and compensated service on the same railway (or predecessor railway) in any 5 of the preceding 10 years shall be guaranteed 12 months' employment in the succeeding year, with payment in each month of that succeeding year of not less than the monthly guarantee applicable to the class of service in which the employee holds seniority; providing, that this guarantee shall not apply to employees who resign voluntarily.

NOTE.—The term "predecessor" shall be understood to include any railway, facility, or operation which has become a part of a successor railway.

XVI. SAVINGS CLAUSE

A. Nothing herein shall eliminate or modify the provisions or bases for minimum separate or additional payment for required road or yard service such as, but not limited to, lap-back and side trips.

B. In lieu of any one or more component parts of the foregoing proposals, existing rules, regulations, agreements, practices, or interpretations considered more favorable by the employees' committee on each individual railroad are preserved.



[fol. 91] CLERK'S NOTE:

PLAINTIFFS' EXHIBIT No. 2

"Report of the Presidential Railroad Commission, Washington, D. C., February 1962" is omitted from the record here. Copies will be filed contemporaneously with the filing of briefs.

IN THE UNITED STATES DISTRICT COURT

Public Law 88-108

PLAINTIFFS' EXHIBIT 3

88th Congress, S. J. Res. 102

August 28, 1963



Joint Resolution

77 STAT. 132

To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

45 USC 151.

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement; Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Railroads,
settlement of
disputes.

Sac. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such

Arbitration
Board.

member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of \$100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however*, That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

August 28, 1963

- 3 -

Pub. Law 88-108

77 STAT. 134.

SEC. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforceable through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

SEC. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence. Expiration date.

SEC. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 713 accompanying H. J. Res. 665 (Comm. on Interstate & Foreign Commerce).

SENATE REPORT No. 459 (Comm. on Commerce).

CONGRESSIONAL RECORD, Vol. 109 (1963):

Aug. 26: Considered in Senate.

Aug. 27: Considered and passed Senate.

Aug. 28: Considered and passed House in lieu of H. J. Res. 665.

[fol. 95]

PLAINTIFFS' EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al
Plaintiffs

vs. Civil Action No. 944
LAWSON E. GLOVER, et al
Defendants

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al
Intervenors

STIPULATION

It is stipulated by the parties through their respective counsel that the attached are genuine and authentic copies of the Award of Arbitration Board No. 282 (established pursuant Public Law 88-108), and of the Opinion Of The Neutral Members, Statement Submitted By Carrier Representatives, Dissent Of Member H. E. Gilbert, and Dissent Of Member R. H. McDonald.

/s/ ROBERT V. LIGHT
Robert V. Light
Attorney for Plaintiffs

/s/ JACK L. LESSENBERRY
Attorney for Defendants

/s/ JOHN P. SIZEMORE
Attorney for Intervenors

[fol. 96]

EXHIBIT A

Before The

ARBITRATION BOARD

Established by Joint Resolution of Congress

Approved August 28, 1963

Public Law 88-108

National Mediation
BoardArbitration Board
No. 282

**CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN,
AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES**
and

**CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHER-
HOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCO-
MOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH
AMERICA**

Washington, D. C.
November 26, 1963

[fol. 97]

AWARD

This Award is made pursuant to Public Law 88-108, 88th Congress, S.J. Res. 102, enacted August 28, 1963.

The organization parties to the dispute named H. E. Gilbert and R. H. McDonald as organization members of this Arbitration Board. The carrier parties to the dispute named Guy W. Knight and J. E. Wolfe as carrier members of the Board. Benjamin Aaron, James J. Healy, and Ralph

T. Seward were named as neutral members by the President.

On September 11, 1963, the Board met, elected its Chairman and adopted rules of procedure. On September 23, 1963, in accordance with Section 3 of the Joint Resolution, the Secretary of Labor furnished to the Board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, together with memorandums setting forth his understanding of the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement.

Public hearings were held in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made. Rebuttal exhibits and written arguments were received on November 9, 1963.

[fol. 98] On November 6 and 7, 1963, the neutral members of the Board, with the agreement of the parties, visited certain railroad yards in the Chicago area. The sole purpose of these visits was to assist the neutral members in understanding the evidence and arguments presented at the formal hearings and nothing said or shown to them during these visits was accepted as evidence.

During the course of the proceedings, questions arose as to whether certain carriers and certain of their employees were or properly should be parties to the dispute and subject to the Board's jurisdiction. The carriers with regard to which such questions arose were the Union Railroad Company, the Florida East Coast Railway Company, and the Elgin, Joliet & Eastern Railway Company. The Board declined to rule on these jurisdictional questions on the grounds that final determination of the Board's jurisdiction over any particular carrier and any particular group of employees could be made only by the courts and that time did not permit the Board to conduct the special proceedings required for such a determination. Nothing in this Award, however, and no action by the Board, including the

reception into evidence of Carriers' Exhibit No. 1 or Employees' Rebuttal Exhibit No. 33, listing certain carriers as parties to the proceeding, is intended to prejudice the position of any carrier or any organization as to these jurisdictional questions.

[fol. 99] The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

I. DISPOSITION OF SECTION 6 NOTICES

Those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto are denied, except to the extent hereinafter provided.

[fol. 100]

II. USE OF FIREMEN (HELPERS) ON OTHER THAN STEAM POWER

PART A—SAVING CLAUSE

A(1). All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.

PART B—REDUCTIONS IN JOBS

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon consideration of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided, that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more [fol. 102] than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a dead-man control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C(1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be re-

[fol. 103] quired to hire firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B(2) and B(3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C(2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C(3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded \$200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 [fol. 104] per cent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C(4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper) since that date, may be separated from the carrier's payrolls as

firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C(5). The provisions of paragraphs C(3) and C(4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another [fol. 105] comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper)

roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as here-in provided, the next most junior fireman (helper) on that [fol. 106] of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C(7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C(3) or C(4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

[fol. 107] PART D—RIGHTS TO WORK

D(1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C(3) of this Award shall be entitled to exercise their seniority

rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairman in their respective seniority districts as provided in paragraphs B(2) and B(3) of this Award, as hostlers or hostler helpers, and as engineers in any class of service for which they are qualified; but such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D(2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C(6) and C(7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D(3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the provisions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D(2) of this Award in freight or yard crews, other than in crews designated by the local chairman pursuant to the provisions of paragraphs B(2) and B(3), if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D(4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairman pursuant to the provisions of paragraphs B(2) and B(3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairman as provided in paragraphs B(2) and B(3) of this Award.

[fol. 109]

PART E— CONTINUING STUDY

E(1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E(2). The National Joint Board established in paragraph E(1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

III. CONSIST OF ROAD AND YARD CREWS (OTHER THAN ENGINE SERVICE)

PART A—BASIC PROVISIONS

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiations. Pending the consummation of local agreements

disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and un-[fol. 110] classified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

- (a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and
- (b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

[fol. 111] and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees

holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCEDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

- (a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after the receipt of such request.
- (b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

[fol. 113] PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

- (a) Assurance of adequate safety.
- (b) Avoidance of unreasonable burden or workload on members of the crew.
- (c) Changes in operating conditions, including density of traffic.
- (d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
- (e) Special conditions which exist on any particular assignment.
- (f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
- (g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

- (h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
- (i) State, county, or municipal regulations applicable [fol. 114] with respect to highway, street, road, railroad, or other crossings or intersections.
- (j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
- (k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

- (a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.
- (b) The number of passenger cars handled in the train and passenger count.
- (c) The method of handling passenger transportation (tickets).
- (d) The number of passengers boarding and leaving the train at intermediate stations.
- (e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

- (a) The amount and nature of work to be performed en route.
- (b) The length of train, in context with the amount and nature of work to be performed en route.
- (c) Time limitations applicable to the particular assignment.

[fol. 115] C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

- (a) The amount and nature of the work to be performed.
- (b) Volume of work considered in context with applicable service time limitations.

PART D—EMPLOYEE PROTECTION

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as “protected employees.”

D(2). A “protected employee,” known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier’s active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such “protected employee” shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which [fol. 116] such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by “protected employees” then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award,

before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

[fol. 117]

IV. DURATION

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

Dated: November 25, 1963

Benjamin Aaron
Neutral Member

James J. Healy
Neutral Member

Ralph T. Seward
Chairman of the
Arbitration Board

CONCURRING:

Guy W. Knight
Carrier Member

J. E. Wolfe
Carrier Member

DISSENTING:

H. E. Gilbert
Organization Member

R. H. McDonald
Organization Member

[fol. 118]

Before The
ARBITRATION BOARD
Established by Joint Resolution of Congress
Approved August 28, 1963
Public Law 88-108
National Mediation Board
Arbitration Board
No. 282

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN,
AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES

and

CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHER-
HOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCO-
MOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH
AMERICA

OPINION OF THE NEUTRAL MEMBERS

[fol. 119] We write this opinion as the neutral members of a statutory arbitration board—a board whose creation was virtually forced upon Congress as the only way of avoiding a nationwide railroad strike. Never before in peacetime has Congress found it necessary to take such action. We wish at the very outset to record our regret that in this case the leaders of the railroad industry and the railroad operating unions were unable to agree upon some method of resolving their differences which would avoid the need for Congressional intervention. The great virtue of arbitration as it has developed in this country's

labor relations has been the fact that it was a *voluntary* procedure, created and shaped by the disputing companies and unions themselves and thus responsive to their peculiar problems, values, and needs. It is unfortunate that the parties in this case, though finally agreeing in principle to arbitration, failed to agree upon the terms and procedures of an arbitration agreement and thereby abandoned to Congress an opportunity and responsibility that should rightly have been theirs.

We have been asked to decide only two of the issues which separate the parties: the so-called "fireman (helper)" issue and the so-called "crew consist" issue. It is the evi- [fol. 120] dent hope of Congress that once these two issues have been settled, agreement on the remaining issues can be reached in direct collective bargaining. All citizens must join in the hope that failures of leadership—on either side—will not again make it necessary for the Government to do for the parties what the parties should do for themselves.

Preliminary Comments

Both of the issues before us concern meaning and the effect on manning of technological progress and change. In view of the present national concern with such questions—with problems of automation and unemployment—the limitations under which we must deal with these issues should immediately be made clear. We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement. There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview.

[fol. 121] In approaching our task we have been fully aware of the handicaps imposed upon us not only by our

relative unfamiliarity with the complex problems of railroad operation but also by the narrow time limits within which we have been compelled by the Joint Resolution to complete our work. We have had to base our judgments entirely upon the evidence and arguments presented to us by the parties in the formal context of adversary proceedings. Our brief personal inspection of a few representative types of diesel switching operations permitted us only to gain a better understanding of what the parties were telling us. These difficulties, however, only underscore the gravity and importance of our task; they cannot relieve us of our obligations.

The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular [fol. 122] jobs should be made subject to elimination. The sharpest and most stubborn disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared “blankable” within a given length of time. It is important to realize, however, that *declaring a job “blankable” under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant*. The Board's award makes the actual elimination of jobs subject, in most cases, to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination that a job is “blankable” will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it.

The provisions of our award are explained in general terms in this opinion, without reference to certain refinements spelled out in the award. In the event of any inadvertent conflict between the explanation given in this opinion and the precise language of the award, the latter is, of course, intended to govern.

[fol. 123] The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. Problems that are as deeply rooted and that have been as long in development as those here involved, however, cannot be solved overnight. In this case, rapid readjustment could have a human price too great to pay. If, through this award, principles are established and procedures set in motion which contribute to a final solution, our hopes as neutral members of this Board will have been fulfilled.

The Parties and the Issues

The dispute before us involves almost all of the Nation's major railroads and the five railroad operating brotherhoods. The railroads (often referred to herein as the "carriers") are represented by the Eastern, Western, and Southeastern Carriers' Conference and by the National Railway Labor Conference. Together they conduct about ninety per cent of all railway operations in the United States. The brotherhoods (often referred to herein as the "organizations") are the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Locomotive Firemen and Enginemen (BLF&E), the Order of Railway Conductors and Brakemen (ORC&B), the Brotherhood of Railroad Trainmen (BRT), and the Switchmen's Union of North America (SUNA), the first two representing "engine service" employees and the last three "train service" employees. In all, some 200,000 employees are represented in the dispute.

[fol. 124] The assignment, duties, and compensation of these operating employees are governed by a complex struc-

ture of rules, agreements, laws, and understandings which have developed through decades of practice and collective bargaining and which has roots running back to the turn of the century and beyond. This structure has persisted with comparatively slight adjustment, despite drastic changes in railroad technology and equipment, in the competitive position of the railroads and in the general pattern of American industry with regard to wage rules and fringe benefits. Both parties are now seeking to change and—in their own terms—“modernize” this structure. But they disagree sharply as to the nature, direction, and rate of the desired changes and as to how and by whom the price of change should be paid.

One of the central points of disagreement concerns the continued use of firemen (sometimes—and particularly in yard switching operations—referred to as “helpers”) on locomotives, such as diesel-electric or electric locomotives, which do not use steam power and on which the work of firing the boilers therefore need not be performed.¹ In 1937, when the “dieselization” of railroad power was just [fol. 125] beginning and its future was still uncertain, the carriers and the BLF&E entered into a National Diesel Agreement which, in substance and as since modified in certain details, requires the employment of a fireman on all locomotives, whether or not they used steam power, with the exception only of certain yard switchers below a specified weight and certain electric rail cars or self-propelled rail motor cars or construction machines. This requirement remains in effect, even though “dieselization” has since swept the industry and even though there are now only a handful of steam locomotives in service. The carriers accept the continued use of firemen on passenger diesel locomotives, where there are now only two men in the cab. They assert, however, that in road freight opera-

¹ For the sake of simplicity and to avoid the cumbersome “fireman (helper)” locution, we will hereafter call the second member of the engine service crew a “fireman,” even though the parties might sometimes call him a “helper.”

tions, where the head brakeman is in the cab to provide left-hand lookout, and in yard switching operations, where the ground crew guides the engineer, no fireman is needed for lookout or signal-passing duties, and that the present duties of firemen in connection with the detection and correction of mechanical or electrical malfunctions can be performed—and, indeed, often *are* performed—by engineers and shop maintenance men in the normal course of their work. For some years, therefore, the carriers have been pressing for the modification of the National Diesel Agreement and the right to eliminate all fireman positions. The organizations have resisted the move, claiming that the work performed by a fireman—left-hand lookout, signal passing, engine inspection, and the correction of malfunctions—is still necessary and cannot properly be performed by other employees.

[fol. 126] A second central point of difference concerns the make-up—or “consist”—of train service crews in road and yard service. This matter is usually regulated, not by national rule, but by a wide variety of local agreements, rules, and practices, and—in a number of states—by statute or administrative decision. It is the carriers’ position that many of these regulations are out of date and fail to reflect recent development which have lightened the workload of the train service crews, such as the decline in less-than-carload lot freight shipments; the fall-off in passenger traffic and baggage-handling work; and the spread of automatic block signals, centralized traffic control systems, “hot box” detectors, radio or telephonic communication systems, and other work-saving devices. The carriers contend that because of the lack of relationship between workload and required crew size many trainmen have little or nothing to do. The carriers are pressing, therefore, for the modification or elimination of all rules or agreements that restrict their right to determine crew size. The organizations resist, claiming that modern developments such as the increased size and speed of freight trains and the competitive pressures for rapid switching and transfer operations have

added to the work and responsibilities of many train crews and that, in any case, crew size is a matter for negotiation and agreement rather than unilateral determination.

[fol. 127]

History of the Dispute

The formal beginning of the dispute came on November 2, 1959, when—pursuant to Section 6 of the Railway Labor Act—the carriers served the organizations with notices of proposed changes in many work and compensation rules, including those bearing on the fireman and crew consist issues, just discussed. With regard to the “Use of Firemen (Helpers) on Other Than Steam Power,” the carriers proposed the elimination of all regulations—including, of course, the National Diesel Agreement—which required the employment of firemen on other than steam power in any class of freight or yard service. They do *not*, it must be emphasized, propose the elimination of such regulations in passenger service. They also proposed a new national rule which would give management the unrestricted right to decide when and if a fireman should be used in freight and yard service. With regard to the “Consist of Road and Yard Crews,” the carriers proposed the elimination of all regulations, however established, applicable to the consist of crews in road or yard service, which require: (1) a stipulated number of trainmen or more than one conductor in any crew used in any class of road service; (2) a stipulated number of brakemen or helpers or more than one conductor or foreman in any crew used in any class of yard, transfer, or belt line service; or (3) a conductor or trainman in connection with the movement of light engines or in pusher or helper service, or an engineer, conductor, or trainman in pilot service.

[fol. 128] Counter-proposals were submitted by the organizations on September 7, 1960. Under the heading “Minimum Safe Crew Consist” they proposed, in the first place, a new national rule which would extend the use of firemen even to those classes of locomotives, such as light switching engines or electric rail cars, on which firemen

had not previously been required. In the second place, with regard to train crews, they proposed a rule which would require not less than one conductor (foreman) and two trainmen (brakemen, helpers) in all classes of train service, plus "such additional employees as are required to assure maximum safety."

It is needless, here, to give a detailed history of all the local and national negotiations, the mediation procedures, the studies, the investigations, the court proceedings, the recurrent crises, and the Government efforts that culminated, at last, in Congressional action. It is enough to mark those stages in the development of the dispute which have direct relevance to the issues before us and to which we will be returning as we consider these issues on the merits. They may be summarized as follows.

1. *The Presidential Railroad Commission.* This Commission, requested and agreed to by both parties, was appointed by the President in November, 1960. It was composed of fifteen members, divided equally between carrier, organization, and public representatives. Directed to inquire into the dispute and report its findings and recommendations, it devoted more than thirteen months of study to the issues, held extensive hearings, conducted independent studies, made field inspection trips on trains and at railroad installations and, in the light of the information thus gathered, endeavored unsuccessfully to find a basis for a mediated settlement. The report of its public members, issued on February 26, 1962, contained detailed findings on each of the issues and a series of far-reaching recommendations for the modification or review of many work rules, including those relating to the fireman and crew consist issues, and for a major revision of the railroads' pay structure. The carrier members filed a statement expressing dissatisfaction with the report but nevertheless accepting it. The organization members filed dissenting or separate opinions rejecting most of the recommendations, including those bearing on the fireman and crew consist issues.

There followed a series of unsuccessful negotiations pursuant to the Railway Labor Act, announcement by the carriers of their intention to put work rule changes into effect, and litigation by the organizations to forestall such action. The litigation ended in March of this year in a Supreme Court decision that the parties

“... having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions ... for the creation of an Emergency Board.”²

[fol. 130] 2. *Emergency Board No. 154*. This Board, composed of three public members, was established by the President on April 3, 1963, following an announcement by the carriers of their intention to put their proposed rules changes into effect and notice from the organizations that such action would result in an immediate strike. Though it had access to the records of the Presidential Railroad Commission, it did not attempt to redo that Commission's work. Rather the Emergency Board devoted its efforts almost entirely to the mediation of the dispute, seeking, as it said, “constructive solutions rather than the mere restatement of the previously fixed positions of the parties,” and exploring “paths which may develop into avenues of settlement.” It issued its report on May 13, 1963, recommending with regard to each issue a series of guidelines and procedures which might serve as a framework for further collective bargaining. Both as to the fireman issue and the crew consist issue, the recommended procedures included arbitration as a means of settling unresolved issues. The carriers offered to accept the recommendations. The organizations declined either to accept or reject the report, but stated that it could be “a useful tool in the search for a fair and suitable settlement.”

3. *Negotiation and Mediation—May through July, 1963*. Following the report of Emergency Board No. 154, there

² *Brotherhood of Locomotive Engineers v. Baltimore and Ohio Railroad*, 372 U.S. 284 (1963).

was a period first of direct negotiation between the parties [fol. 131] and then of intensive mediation by the Secretary and Assistant Secretary of Labor joined by the Chairman and Members of the National Mediation Board, the thirty-day statutory status-quo period being extended, at the President's request, to July 10, to permit these mediation efforts to proceed. We will later refer to certain of the proposals, memoranda, and written or oral statements which the parties issued during this period. At this point only three things need be noted. (A) *The Secretary of Labor's proposals of July 5 for the disposition of the fireman and crew consist issues, by accepting the principles of the report of Emergency Board No. 154 and arbitrating specific rules.* These proposals were accepted by the carriers but rejected by the organizations on the ground that they involved arbitration. (B) *The President's proposal of July 9 that all issues be submitted by agreement to Associate Justice of the Supreme Court Arthur J. Goldberg for final determination.* The carriers accepted this proposal. The organizations rejected it. (C) *The Investigation and Report of a Subcommittee of the President's Advisory Committee on Labor-Management Policy.* This Subcommittee, which the President appointed on July 10, after the parties had agreed to a further extension of the status quo to July 29, made no recommendations but reported to the President as to the nature of the issues and the positions of the parties.

[fol. 132] 4. *Referral to Congress.* The President, on July 22, sent a special message to Congress, transmitting the report of the Subcommittee of the President's Advisory Committee on Labor-Management Policy, and recommending, in substance, that for a two-year period and pending agreement on the disputed issues, the Interstate Commerce Commission should have authority to rule on proposals for interim changes in work rules. Lengthy hearings on this proposed legislation were held both by the Senate Committee on Commerce and the House Committee on Interstate and Foreign Commerce. Before both bodies, representa-

tives of the parties appeared and stated their positions on the issues in dispute. At the urgent request of members of the House and Senate Committees, the parties once more agreed to an extension of the status quo—this time to August 29, 1963—and the Secretary of Labor undertook further efforts to mediate the dispute.

5. *The August 2 Documents of the Secretary of Labor.* On August 2, the Secretary of Labor submitted documents to the parties regarding the fireman and crew consist issues. In an accompanying memorandum, he stated that the documents were intended to identify, with respect to each issue, those areas in which, in his judgment, there was the largest possibility of agreement. The papers were based either on previous recommendations, or on the public, or exchanged, statements of the parties, with some modifications made by the Secretary himself. He urged that negotiations proceed promptly on the basis of the documents [fol. 133] and undertook to continue mediation sessions "until agreement is reached or until it is clear that agreement cannot be reached—and why it cannot be reached."

There followed a series of meetings and discussions designed to clarify the meaning of the August 2 documents and to develop the positions of the parties with respect to those documents. On August 12, however, it became clear that the parties were deadlocked and could not reach final agreement on the merits of either issue.

6. *The August 15 Proposal for Voluntary Arbitration.* After the final breakdown of negotiations, the Secretary of Labor proposed that the parties submit the two key issues—fireman and crew consist—to final and binding arbitration by a six-man board, two members to be appointed by the carriers, two by the organizations, and two by the President. The Board was to make its award within ninety days and was itself to decide the period for which the award would be controlling. The remaining issues were to be taken up by the parties after their receipt of the award.

The carriers accepted this proposal. The organizations indicated their acceptance in principle but rejected certain

of the procedural provisions. Efforts to bring the parties to agreement on the terms and procedures of an arbitration agreement were unavailing.

[fol. 134] Thus, by August 28, after four years of collective bargaining, exhaustion of the mediation procedures of the Railway Labor Act, investigation and recommendations by two Presidential Commissions, and intensive mediation by the Secretary and Assistant Secretary of Labor and the National Mediation Board, there was still no settlement and the country was faced again—as it had been repeatedly during the course of the dispute—with a nationwide railroad strike. As the President had stated in his message to Congress, such a strike would force the almost immediate shutdown of all the industrial establishments which depend primarily on rail shipments; would jeopardize the fruit and vegetable and grain crops; would disrupt mail service and commuter traffic and—if it lasted even thirty days—would result in the layoff of some 6,000,000 non-railroad workers in addition to the 700,000 idled railroad employees, a rise in unemployment to fifteen per cent, and a drastic decline in production and in our competitive position in foreign and domestic markets. Faced with this prospect, despite this country's traditional opposition to arbitration compelled by law, Congress adopted the Joint Resolution, Public Law 88-108, which created this Board and initiated the present proceeding.

The Joint Resolution established this Board as a seven-man, tripartite arbitration board, similar in status to those functioning under the Railway Labor Act and subject, insofar as is consistent with the Joint Resolution, to the procedural requirements of Sections 7, 8, and 9 of that Act. [fol. 135] It submitted the fireman and crew consist issues to the Board for final and binding determination. It directed the Board to begin its hearings within thirty days and to make and file its award in the United States District Court for the District of Columbia within ninety days after the Joint Resolution's enactment. The award is to become effective sixty days after filing and is to continue in force

for a maximum of two years, unless the parties agree otherwise.

The Board has today completed the task which Congress set it. After holding twenty-nine days of hearings, receiving the testimony of more than forty witnesses recorded in almost 5,000 pages of transcript, examining more than 200 documentary exhibits, together with a number of motion pictures, photographs, and charts, making inspection trips to four railroad yards in the Chicago area and discussing the issues at length in executive session, the Board has executed and filed its award on the fireman and crew consist issues.

[fol. 136]

The Joint Resolution and the Board's Approach

The outer limits of our jurisdiction are set by the notices of proposed changes in the rules and agreements with which the parties initiated this dispute. In Section 3 of the Joint Resolution, Congress provided that the Board

“ . . . shall make a decision . . . as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on other than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. . . . ”

Congress did not, however, leave the matter there. Asserting in the preamble to the Joint Resolution the desirability that the dispute be settled “in a manner which preserves and prefers solutions reached through collective bargaining,” it directed the Board's attention to the suggestions for the settlement of the fireman and crew consist issues which the Secretary of Labor had made to the parties on August 2, 1963, during the final stages of his mediation efforts. It asked the Secretary to furnish these suggestions to the Board and to inform the Board as to

"... the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement."

It then directed that the Board

"shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement."

[fol. 137] Furthermore, in laying down standards for our guidance, Congress directed that we consider not only the effect of our award upon adequate and safe transportation service to the public and upon the interests of the affected carriers and employees, but also to

"... the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

In accordance with these instructions, the Board's endeavor has been to deal with these issues within the context of the parties' own bargaining, searching for areas of agreement or tentative agreement or, lacking these, of common emphasis and approach. It has not been an easy task. Though the parties largely agree as to the objective circumstances and sequence of their various meetings and the substance and subject matter of their discussions, they are in sharp disagreement whether any of the positions taken represent commitments which should properly be continued and built on by this Board. The problem has been complicated, further, by the fact that the parties often met, not with each other, but with the Secretary of Labor or his assistants and thus had only second-hand knowledge of each other's positions.

In spite of these difficulties, however, no single aspect of this case has received more of our attention than our

obligation, under the Joint Resolution, to give due consideration to whatever agreements or tentative agreements the parties reached in their bargaining. Our conclusions are as follows.

[fol. 138] As to the fireman issue, though we have found no binding commitments, we have found a large area of at least tentative agreement regarding the benefits and protections that might appropriately be provided to displaced firemen. On the question of the relative equities of firemen of different lengths of service and different degrees of attachment to the industry, moreover, the parties substantially agreed as to general principles, though disagreeing as to the manner in which those principles should be implemented. And even in those areas where disagreement was sharpest—the cluster of issues touching on the proposed elimination of firemen's jobs—we have found a common recognition that, where a job has been determined to be unnecessary, the equities of the fireman working on that job may nevertheless properly affect the method and timing of its elimination.

All of these questions, however, have to do primarily with the treatment of *individual* firemen. With regard to the treatment of firemen's *jobs* we have found next to nothing in the way of agreement that could serve as a meaningful foundation for our award.

It is true, as the Secretary of Labor says in his memorandum to the Board, that

"The principle of blanking a fireman (helper) job if, but only if, there is no fireman (helper) on the fireman (helper) seniority list available to fill a vacancy which develops, if filling the vacancy would require a new hire and if blanking the job will not unduly endanger safety or unduly burden other employees was accepted by both parties."

[fol. 139] The first portion of this agreement on principle, however, has to do less with *jobs* than with *individuals*; it is an expression of the attrition principle that the "blanking"

of a job should be dependent upon the prior exhaustion of individual seniority rights. As to a practical method of determining whether "blanking a job will . . . unduly endanger safety or unduly burden other employees," we found basic disagreement. Both parties recognized that to proceed on a job-by-job basis would result, to use the language of Emergency Board No. 154, in a "hailstorm of grievances" and, in all probability, an equal "hailstorm" of requests for arbitration by a special board. There was long and detailed discussion, during the summer months, of the principle that certain categories of jobs could be agreed to in advance as not requiring case-by-case review to determine safety and undue burden and that jobs in other categories could be made "blankable" only by agreement or after review by a special board of adjustment. But as to what classes of jobs should be assigned to what categories, as to whether or not there should be a completely non-blankable category, and as to the category sequence which should be followed in blanking jobs, we found stubborn disagreement. Organization proposals on these questions, though repeatedly discussed, amended, and refined, were never accepted by the carriers. Finally, and most important, there was absolutely no agreement by the carriers to the organizations' proposal that there should be an overall limitation on the number of firemen's jobs that might, [fol. 140] for any reason, be eliminated. Though the organizations repeatedly claimed that their proposed system of job categories, category sequences, attrition arrangements, and blanking procedures would result in the elimination of some 5,500 jobs, and eventually offered to guarantee that figure, the carriers never agreed to any maximum figure whatsoever.

With regard to the fireman issue, then, though we have been able to develop and complete the parties' tentative agreements concerning the treatment of individual firemen, we have found no substantial structure of agreement on which we could base our award concerning the proposed elimination of firemen's jobs. We have had only the sug-

gestion that if the "hailstorm" of disputes could be reduced by a system of categories, review of questions of safety and undue burden by special boards of adjustment would be a manageable and acceptable procedure. In the face of disagreement concerning the category system, this offers little foundation on which to build. In treating the *job* phase of the issue, then, we have had no alternative but to start from scratch, studying the evidence as to the duties and functions of firemen, drawing our own conclusions as to the general need for firemen on locomotives that do not use steam power, and attempting ourselves to develop a practical system of determining which jobs, if any, may be eliminated.

With regard to the crew consist issue there is far more evidence of agreement and tentative agreement. We [fol. 141] have been able to confine ourselves almost entirely, therefore, to the development and refinement of these agreements, the resolution of minor issues, and the cleaning up of details. Both parties seem to have agreed that determinations of proper crew size could best be made locally and that the main problem is one of establishing a satisfactory procedure for the review of such determinations and satisfactory guidelines for the reviewing agency. Both parties seem also to have agreed that the actual process of eliminating jobs found to be unnecessary should be controlled by natural attrition. The principal disagreements concern, on the one hand, the *scope* of the review procedure (i.e., what classes and sizes of crews should be reviewable) and, on the other hand, the *scope* within which attrition should operate (i.e., whether protection should extend only to those actively employed or to furloughed employees as well).

We turn now to a more detailed discussion of the issues.

[fol. 142] THE FIREMAN (HELPER) ISSUE

Basis of Findings

In view of the lack of agreement between the parties on the need for firemen in road freight and yard service,

we have found it necessary to consider the issue as framed by the initial notices of the parties.

The testimony, exhibits, and arguments submitted to this Board on this issue covered the same areas, though not always in such exhaustive detail, as those dealt with by the parties' presentations to the Presidential Railroad Commission. Thus, in both proceedings the principal points emphasized were (1) the lookout function in freight and yard service; (2) the mechanical function in freight and yard service; (3) relief of the engineer in both types of service; (4) findings of other tribunals dealing with some aspects of the fireman's role; (5) foreign experience related to the issue; and (6) the essentiality of firemen as a future source of engineers.

We shall not attempt to summarize in this opinion the considerable body of evidence introduced by the parties on these various subjects during the course of the instant case. It would be impossible to do so within manageable limits without paraphrasing or omitting references to many matters which the parties deemed important; such an attempt, as is evident from the organizations' reaction to the report of the Presidential Railroad Commission, would only lead to misunderstanding and resentment. Accordingly, on this point we shall limit ourselves to two observations. First, we believe that to the extent that it has been humanly possible within the limited period of time available, we have reviewed and given due consideration to all evidence and argument submitted to us by the parties on this issue. Second, in our judgment the substance of the parties' presentations to us is essentially the same as that referred to in the Commission's report, and no useful purpose would be served by our covering the same ground again in this opinion. We emphasize, however, that although the Commission's report is part of the official record in this case, and we have given it such persuasive weight as we think it deserves—which is considerable—we have not felt bound by its conclusions, nor does our award necessarily imply agreement with all of them.

Our own independent examination of the record before this Board leads us to the following findings and conclusions:

1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work.

2. The lookout function presently assigned to the fireman is also performed by the head brakeman in road freight service and by all members of the train crew in yard service [fol. 144] vice. In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members.

3. A considerable portion of the mechanical duties now performed by the fireman is not absolutely essential to the safety and efficiency of road freight and yard operations. Those duties which are essential can be performed by the engineer while the locomotive is in service and by shop maintenance personnel at other times. These arrangements would not involve the assignment of fireman's duties to members of other crafts not presently authorized to perform them.

4. Relief of the engineer by the fireman in road freight and yard operations is of critical importance only in the event that the engineer suddenly becomes incapacitated by death or illness. In road freight service the usual presence of the head brakeman in the cab obviates the need for a fireman in such an emergency. In yard service the normal lack of a third man in the cab is offset in part by the reduced speed of the locomotive, and will be offset still further by installing a dead-man control in all yard engines, which our award requires as a condition precedent to the operation of such locomotives without a fireman.

5. Both the Presidential Railroad Commission and Emergency Board No. 154 have concluded that in most instances firemen are not required in road freight and yard service. [fol. 145] In addition, several emergency boards and one arbitration board in this country, although not dealing with precisely the same issue, have ruled adversely on related proposals by the BLF&E and the BLE.

6. Much of the evidence adduced by the carriers on the manning of locomotives on foreign railroads is not readily subject to verification. In any event the many differences in equipment and in operating practices and conditions between American railroads and those of other countries render comparisons in respect to this issue of little or no value.

7. The essentiality of firemen as a future source of engineers was not emphasized in the proceedings before this Board, and there is not much evidence in the record to support any meaningful conclusions. It is apparent, however, that even if the provisions of our award should continue unchanged, firemen on passenger trains will provide a substantial pool of potential engineers for freight as well as passenger service. In the event that a shortage of engineers develops, there should be no serious difficulty in establishing special training and upgrading programs.

In short, although our findings on this issue do not coincide on all points with those of the Presidential Railroad Commission, and although we think it clear that firemen are presently performing useful services, we agree with the Commission "that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such [fol. 146] diesels." Like the Commission, however, we also believe that this conclusion should not "preclude the occasional assignment of firemen-helpers on some of the road freight or yard runs which are atypical and which have unusual characteristics." Specifically, we are satisfied that

a certain number of such assignments require the continued employment of firemen in order to prevent excessive safety hazard to lives and property, to avoid imposing an undue burden upon the remaining crew members, and to assure adequate and safe transportation service to the public. Of these three considerations, that of safety of railroad employees and equipment seems to us, in the context of this case, to require the most careful attention.

This last observation merits a brief additional comment and explanation. It may be fairly stated that concern with safety has pervaded this entire proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel. Safety is, of course, essentially a relative concept; once adequate minimum standards have been achieved, the decision as to how much more safety is required must necessarily be governed by all the accompanying circumstances. Railroading is, unfortunately, a hazardous occupation, and the problem before us cannot be viewed simply in terms of preventing or not preventing accidents. We wish to make it absolutely clear, however, that our judgment on this question has not been affected by considerations of cost or ability to pay.

[fol. 147]

Reductions in Jobs

One of the most formidable problems confronting this Board and everyone else who has sought a means of resolving the instant dispute is to devise some practicable way to determine the extent and character of the exceptional cases in which the employment of firemen in road freight and yard service is necessary or prudent. The Presidential Railroad Commission concluded that the exceptions were so rare that it was neither feasible nor desirable to establish any procedure for identifying them. By making no recommendation on this point, the Commission, in effect, left the assignment of firemen in road freight and yard service to the discretion of management.

Emergency Board No. 154 adopted a different approach. Unlike either the Commission or this Board, it made no findings on the merits of the fireman issue but simply set forth its understanding of the respective positions of the parties, together with suggestions as to how the dispute might be resolved. Thus, it noted that "the brotherhoods do not contend that there are no jobs presently occupied by firemen which cannot be abolished," and that "the carriers, being realists, have suggested that there may be a few freight situations in which the services of a fireman are needed." The Emergency Board proposed a review procedure to determine, in disputed cases, whether the discontinuance of a fireman's job "would unduly endanger safety or unduly burden other employees who would have to take on some of the responsibilities formerly performed by the firemen." It expressed the belief that, properly [fol. 148] administered, these principles could be applied so as to prevent both the arbitrary elimination of jobs and abuse through a flood of baseless grievances.

The procedures suggested by the Emergency Board contemplated the assistance of neutrals in establishing "certain categories of jobs or situations the elimination of which by the employer would probably be protested on the basis of safety or undue hardship." They also contemplated the "definitive disposition" by neutrals of unresolved disputes within a fixed period of time, although the way in which this latter suggestion was to be translated into action was not made entirely clear.

In the negotiations which followed the issuance of the Emergency Board's report the parties discussed various ways of accomplishing the review of those situations in which management's decision to eliminate a job would be challenged on grounds of safety hazard or undue burden. The Secretary of Labor's memorandum of August 2, which was based in part on the Emergency Board's report and in part on previous documents and statements of position by the parties, and which served as the principal basis for the ensuing discussions of the issue by the parties with

various Government mediators, suggested that road freight and yard jobs be classified into groups of categories. Jobs in the first group would be considered blankable in accordance with a prescribed sequence of categories within [fol. 149] that group. Disputes over whether a given job fell within that group, or within one or another of its categories, were to be finally resolved by a special board of adjustment. Jobs in the second group of categories were to be blankable only if the result would not unduly endanger safety or unduly burden other employees. Disputes over these questions were also to be finally resolved by a special board of adjustment. Jobs in the third group of categories were not to be blanked except by agreement of the individual carrier and the organization representing the employees involved.

As previously indicated, the parties differ sharply as to the extent of agreement, if any, they reached on the terms of the August 2 memorandum. Our conclusion is that although the memorandum provided the focal point for their negotiations and in that sense may be said to have brought about a narrowing of the issues, the parties remained in hopeless disagreement on the crucial questions of the numbers and types of jobs on which firemen need no longer be employed, and the sequence and methods of their removal from service.

The Joint Resolution, although providing the means for finally disposing of the principal issues in this long-standing dispute, also introduced two additional complications. The first is the requirement that the award "shall constitute a complete and final disposition" of the issues submitted to the Board. That statement means, among other things, that the Board cannot delegate to any other body [fol. 150] the power finally to determine any of the matters in dispute, except in accordance with relatively restricted and precise standards.

In our opinion sufficient knowledge upon which to base such standards could be obtained only by first-hand observations on the property of each of the carriers involved in

this case. In this respect the fireman issue differs markedly from the crew consist issue, as to which the parties themselves developed twenty detailed guidelines for resolving disputes over the manning of train crews. Conversely, on the basis of the record on the fireman issue the Board would be hard put to prescribe standards more definite than those of avoiding safety hazards and the imposition of undue burden on remaining crew members, and insuring adequate and safe public transportation. It is doubtful whether a referral by this Board of cases in which the need for a fireman is disputed to a subsidiary board or boards, with instructions to resolve such disputes on the basis of the general standards just mentioned, would satisfy the statutory command that the Board's own award must constitute a "complete and final disposition" of the issues.

[fol. 151] The second complication introduced by the Joint Resolution is the provision that the Board's award shall in no event remain in force for more than two years after its effective date. This means that even if the Board were able to devise legally adequate standards which could be applied by subsidiary bodies to resolve disputes over the necessity for firemen in specific situations, the administrative difficulties involved in making such determinations in sufficient time to yield any significant results would be overwhelming.

The foregoing observation will, perhaps, become more meaningful when one considers the magnitude of the problem confronting the parties. The number of firemen's jobs in road freight and yard service involved in this dispute exceeds 30,000. So deeply are the parties divided on the issue of the need for firemen in road freight and yard service that the predictable attempts by the carriers to eliminate virtually all of these jobs would almost certainly be promptly and vigorously challenged. As the number of such disputes on the various railroads increased, so would the difficulty of obtaining the services of qualified neutrals to resolve them. Considering the probable size of the case load, the likelihood of reducing it significantly in a two-

year period would not be very great. Moreover, even the application of uniform standards in all cases would not guarantee consistent results. Finally, the costs to the parties of these numerous proceedings would be very high. In short, we are convinced that the arbitration of disputes [fol. 152] over the need for firemen in road freight and yard service on a case-by-case basis on each railroad, even if legally permissible, would simply not be administratively feasible.

It thus becomes necessary to find an appropriate substitute for the arbitration of these types of disputes—the only method of final disposition contemplated by the Emergency Board or seriously considered by the parties during their lengthy negotiations. The procedure we have devised for this purpose involves two steps, for each of which we have specified reasonable time limits. The first step is to be taken by the individual carrier. Within one week from the effective date of the award in this case, it will have the right to establish two lists of crew assignments—one for freight engine crews and one for yard engine crews—then in effect within each fireman seniority district. The crew assignments thus listed may include all of those which, in the judgment of the carrier, based upon considerations of safety, undue work burden on other crew members, and adequate transportation services to the public, do not require the services of a fireman.

The second step is to be taken by the organization representing the firemen in the given seniority district. After receiving the two lists and discussing them with the carrier, the organization will have the right, based upon considerations of the same criteria of safety, undue burden, and adequate public transportation service, to designate up to ten per cent of the crews on each of the two lists in which a fireman must continue to be employed. The organization's judgment as to which crews must continue to use a fireman will be final and not subject to challenge.

At three-month intervals the two-step process described above will be repeated in each seniority district of every

carrier covered by this award. The number of jobs included by the individual carrier in each of the two lists will vary according to the number of diesel locomotives in service at that time, but the proportion of listed crew assignments on which the organization may insist that a fireman be employed will remain a constant ten per cent.

On its face this procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it will not have such an effect is due to three reasons. First, it will be necessary to provide jobs for firemen whose rights to continued employment are guaranteed by the terms of the award. (This aspect of the problem is discussed in greater detail below.) Second, a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service. Finally, in respect to yard locomotives, the Presidential Railroad Commission recommended that no yard locomotive should be operated without a fireman unless and until it is equipped with a dead-man control in good operating condition, and the carriers have indicated from the outset their willingness to accept that recommendation.

[fol. 154] We do not represent the foregoing procedure to be ideal or fool-proof, but we think its virtues of simplicity, certainty, speed, and economy outweigh whatever shortcomings it may have. Both sides have reasonable objections. The carriers point out that the organizations are given absolute authority to decide whether firemen are needed on ten per cent of the crew assignments in road and in yard service. There is no evidence to support the suggestion that the organizations will exercise this power to preserve high-paying jobs rather than to secure the continued assignment of firemen to those crews in which, in their own best judgment, firemen are needed to insure safe and efficient operation. In any event, such ill-advised use of authority would be contrary to the firemen's self-interest. Their concern about safety, in particular, is at least as

great as that of anyone else; and we can reasonably assume that those crew assignments on which the organizations elect to protect the fireman's job will for the most part be those which they regard as most hazardous to operate without a fireman.

The organizations, on their part, argue that for reasons of safety and efficiency, firemen are need on far more than ten per cent of the road and yard engine crews. We do not agree. Admittedly, there is something arbitrary in designating any fixed percentage of engine crew assignments as being so potentially unsafe as to require the services of a fireman. As previously indicated, however, our study of the record has convinced us that the number of road freight [fol. 155] and yard assignments in which considerations of safety and efficiency dictate the need for firemen is relatively small. In allowing the firemen's organizations sole discretion to decide that firemen must be used in up to ten per cent of all crew assignments which the carrier has already concluded can be performed safely and efficiently without firemen, we think we have provided a sufficient margin for error.

Moreover, we wish to emphasize that our conclusions are not based on the assumption that members of any other craft will henceforth perform duties within the exclusive jurisdiction of firemen. Head brakemen will, as in the past, continue to perform, in addition to their other duties, forward lookout functions on the fireman's side of the engine cab. Indeed, in road freight operations there will be, with only infrequent exceptions, a brakeman in the cab with the engineer at all times. In neither road freight nor yard service, however, do we contemplate that brakemen will be asked or expected to perform mechanical repairs and inspections formerly assigned firemen. To the extent that these functions continue, they will be performed in the manner previously described, either by the engineer or by shop maintenance employees.

Although the award issued by the Board in this case disposes of the issues referred to it by Congress, it cannot

prevent similar issues from arising in the future. It is safe to say that no carrier or organization presently involved in these proceedings would welcome a recurrence of this dispute. We have already expressed our sincere [fol. 156] hope that the parties will not again forfeit their right to deal privately with their own problems through the procedures of collective bargaining. Expressions of hope, however, are not enough; accordingly, we have included in the award a procedure for the continuing study of the need for firemen in road freight and yard service.

The device we have established for this purpose is a four-man National Joint Board. Two of the members of this Board will be chosen by the carriers, and one each by the BLF&E and the BLE. The selection of representatives is, of course, solely within the discretion of the participating parties. We urge them, nevertheless, seriously to consider appointment to the Board of men with current and intimate knowledge of and responsibility for the operating problems involved. The functions of the National Joint Board would be reduced to a meaningless charade if its members engaged in adversary debates instead of carefully studying at first hand and discussing the effects which our award has on road freight and yard service conducted without firemen. We would anticipate that the National Joint Board would pay particular attention to the general question whether the award has preserved either too few or too many crew assignments requiring firemen. More specifically, we would expect the Board to study the impact of the award on the safety and efficiency of road freight and yard operations, including the incidence and causes of accidents, delays in service, effects on the public transportation system, and tendencies, if any, to assign duties ex-[fol. 157] clusively within the firemen's jurisdiction to members of other crafts, contrary to the intent of our award.

The carriers' representatives on the Board have urged that the parties not be ordered to establish a National Joint Board, although they have expressed a willingness care-

fully to consider a recommendation to that effect. They argue that the success of the contemplated study depends upon the willing participation and cooperation of the parties involved and, inferentially, that the enterprise is less likely to succeed if it is established under compulsion. Our appraisal of the present situation convinces us, however, that without the impetus provided by the provision in our award establishing a National Joint Board the parties may experience considerable difficulty in reaching agreement on the simple mechanical details of setting it up. We do not feel justified in taking that chance. All members of this Arbitration Board agree that once the National Joint Board is established, it will succeed to an extent directly proportional to the bona fide efforts of all the participating parties to make it work.

The proposed study to be undertaken by the National Joint Board relates only to the fireman issue and is not intended to encompass any of the problems relating to the consist of train crews. The same types of questions to be studied by the National Joint Board in respect to the employment of firemen in road freight and yard service will, under the terms of our award relating to the consist of train crews, be handled by negotiation and arbitration on the properties of the individual carriers.

[fol. 158] *Reductions in Employment*

Thus far we have discussed in detail only the extent to which firemen's jobs in road freight and yard service are to be eliminated and the manner in which that result is to be accomplished. We turn now to a review of the provisions in our award directly relating to the affected employees.

In dealing with the rights of individual firemen we have, as previously noted, found a general accommodation between the parties in respect to guiding principles, although they have remained in disagreement over details. Thus, there has been agreement that, for purposes of determining individual rights, firemen should be classified in the following categories: (1) those recently hired; (2) those "ir-

regulars" whose employment in the railroad industry has been so sporadic that their average monthly earnings from such employment over a given period have not exceeded a specified dollar amount; (3) those who have been on furlough throughout a given period; (4) those with less than ten years' seniority; and (5) those with ten or more years' seniority. Those portions of our award dealing with provisions for each of these categories of employees are explained in general terms below.

1. *New entrants.* In respect to this category of employees the award provides that firemen hired on or after a date two years prior to the effective date of the award [fol. 159] may be terminated; but in that event such employees will receive a lump sum separation allowance. Employees in this category with two full years of service on the date this award becomes effective will, if terminated, receive a separation allowance of six months' pay; those whose length of service is one year or more but less than two years will receive three months' pay; and employees with less than one year's service will receive a lump sum computed on the basis of five days' pay, at the rate of the position last occupied, for each month in which they performed service.

These relatively liberal provisions are based on a different approach than the one implicit in the recommendations of Emergency Board No. 154. It proposed that "those firemen who obtained employment after some reasonable date when it may be presumed that they were on notice that their jobs might not be permanent may have their employment terminated" without compensation of any kind. Although the concept that employees who accept employment with knowledge that it may be terminated in the near future are entitled to no special consideration when that contingency occurs has the support of logic and legal precedent, we think it has less merit than the principle that the relative equities of dismissed employees should be based primarily on length of service and the degree of attachment to the industry. Job-seekers are not always in a position

to make objective judgments about accepting or rejecting job opportunities on the basis of future prospects. Finally, [fol. 160] unlike the Presidential Railroad Commission, which recommended that the carriers be permitted to terminate recent entrants under twenty-five years of age six months after the effective date of the proposed national agreement, we have disregarded age as a factor in any of the protective provisions of our award. In our view the relative number of years of satisfactory service in an industry, regardless of age, is a more valid basis for determining appropriate compensation when the employee is involuntarily terminated.

2. "*Irregulars.*" No proposal for special treatment of this category of employees was included in the Commission's recommendations; the idea was first advanced by the Emergency Board, which made the following recommendation:

"Those who have been employed in recent times as firemen but on an irregular basis, and who consequently have not been able to rely upon the carriers as their primary source of livelihood, may have their rights terminated with a severance allowance equal to some percentage of their recent earnings as a fireman or they may choose to remain on a seniority list with preferential hiring rights for such jobs as may become available and for which they are qualified."

This recommendation was adopted in principle by the parties in their subsequent negotiations and is reflected in the Secretary of Labor's memorandum of August 2. No agreement was reached, however, on several details, the most important of which were the minimum period of employment necessary to qualify for a severance allowance [fol. 161] and the number of months to be used as the basis for computing the severance allowance for those employees who do qualify. Our award in this respect applies to firemen hired more than two years before the date the award

takes effect whose average monthly earnings in railroad service have not exceeded \$200 during the twenty-four full calendar months preceding the effective date of the award. Those "irregulars" who qualify may elect either to terminate with a severance allowance equal to 100 per cent of their earnings during the preceding twenty-four months, or to remain on the seniority lists with rights to such available work on non-blankable jobs as they are qualified to perform.

3. *Furloughed employees.* The Commission did not make a special recommendation for this category of employees, and the Emergency Board recommended that "firemen who have not been employed in recent times" be terminated with no severance allowance. In their subsequent negotiations the parties accepted this principle, on the theory that employees in this category have relatively little attachment to the industry. The award provides that all firemen who were hired more than two years before the effective date of the award and who have not performed service as an engineer or fireman since that date shall be included in this category.

4. *Firemen with less than ten years' seniority.* In respect to employees in this category not otherwise covered by the [fol. 162] terms of this award, the Commission recommended that, except for existing rights and obligations to protect vacancies in passenger service and for promotion to engineer, they be made subject to termination, with appropriate allowances, one year following the effective date of the proposed national agreement. The Emergency Board's recommendations for employees in this category were considerably more liberal, and these provided the framework for subsequent negotiations between the parties.

Our award in this respect simply reflects the substantial area of agreement between the parties. In essence it provides that an employee in this category shall retain his right to fireman's employment unless and until offered a comparable job for which he is, or can become, qualified. The offer of another job carries with it certain guarantees,

including relocation expenses, continuation of applicable fringe benefits, and guaranteed annual earnings for a maximum of five years.

5. There has never been any dispute in these proceedings over the status of firemen with ten or more years of seniority. Our award reflects the agreement between the parties that all firemen in that category who are not "irregulars" or on furlough shall retain all existing employment rights, except as modified by the provisions of the award relating to reduction of jobs, and that, in any event, they shall not be terminated except for cause or by natural attrition.

[fol. 163]

Crew Consist Issue

It has been explained earlier in this opinion that the size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions.

We find from the testimony and evidence that some overmanning exists in road and yard crews as a result of schedule rules and local agreements. Though the evidence as to undermanning is less persuasive, we must also acknowledge this possibility on some assignments. One of the difficulties confronting this Board is the same that confronted the Presidential Railroad Commission. It is the inability to de-

termine from the evidence the extent to which overmanning or undermanning exists. The carriers submitted to our Board, as they did to the Commission, an estimate that approximately 19,000 employees were unneeded in all classes [fol. 164] of service. However, a more recent survey (November 1, 1963) made by the carriers at our request indicated an estimated total of substantially less than 19,000. The only conclusions we may derive from available data are that judgments vary considerably among operating people concerning the adequacy of crew size and that the problem of overmanning, to the extent it exists, varies greatly from carrier to carrier. The organizations submitted no concrete evidence of undermanning.

It is apparent to us that the consist of crews necessary to assure safety and to prevent undue workloads must be determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic. Some yard service crews, for example, now consist of one foreman and one brakeman, while others consist of one foreman and as many as ten brakemen. The variation depends on a great complex of factors, reflected by the guidelines mentioned below. Though the range is less pronounced in road service, it also makes unfeasible a definitive national rule.

In their argument the carriers point out that "operating conditions, operating methods and service requirements vary greatly from railroad to railroad, from division to division and from yard to yard on the same railroad, and, over significant periods of time, on the same division and in the same yard." It is not possible, they say, "to write a rule or rules that would accommodate the consist of crews to such variations in conditions." For this reason, they [fol. 165] urge the elimination of all agreements, rules, regulations, and practices requiring the employment of a stipulated number of trainmen and propose, further, that management should be given the unrestricted right under any and all circumstances to determine the size of crew consist.

The disarming simplicity and the incisiveness of the carriers' approach cannot obscure the basic flaw in the premise

upon which it is founded. Simply stated, that premise is that management shall have the absolute right to determine the consist of crews. If adopted, the carriers' notice of November 2, 1959, would certainly permit local determination and consideration of the many factors affecting adequacy of crew size. But we are not prepared in this situation to award the carriers such a degree of authority. It may well be, as the carriers argue, that a rule giving management the absolute discretion to determine the consist of crews would be self-policing, and that the maintenance of safe and fast service, essential to economic survival, would be a safeguard against abuse of its discretionary powers. The employees involved, however, are entitled to more protection than is afforded by these assurances of good faith. They have a legitimate interest in workload and in safety, and this interest must be given due consideration under the Joint Resolution. For this reason alone it is doubtful if a ruling favoring the carriers would constitute adequate compliance with the statute creating this Board. Under the carrier proposal the employees would be deprived of an opportunity to express effectively their views on a matter of [fol. 166] great concern to them; they would lack an avenue for redress if a carrier operating official abused his discretion or erred greatly in his judgment of the safety hazards and workload involved. In this industry, as the Presidential Railroad Commission stated, there has been a traditional "collective bargaining interest in the matter of crew consist." We agree with the Commission's view that the "collective bargaining process should remain the basic method for resolving disputes concerning this matter."

The organizations' proposal is unsatisfactory for several reasons. First, by prescribing minimum crews for all classes of service, the organizations' notice of September 7, 1960, fails to give consideration to local conditions except for those requiring crews in excess of the minimum. Second, it provides no method for correction of overmanning that may now exist because of schedule rules. Third, it makes no provision for the resolution of unre-

solved disputes. Finally, although the most prevalent crew consist, in other than passenger service, is a conductor (foreman) and two brakemen (helpers), this fact provides the basis for only the most tentative generalizations. It does not justify a national rule establishing this as the minimum consist ratio. Some assignments were cited in the record before us in which the present consist is one conductor and one brakeman. The organizations offered no testimony or evidence to show that these situations were undermanned; yet the effect of their proposal would be arbitrarily to increase these consists by one man.

[fol. 167] The mandate of Congress in the Joint Resolution that this Board shall give due consideration "to those matters on which the parties were in tentative agreement" and "to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation" plays a significant part in the final award on this issue. As we have previously noted, negotiations during the summer of 1963 on the crew consist issue, unlike those on the fireman issue, resulted in tentative agreements and a clear narrowing of the areas of disagreement. This conclusion is supported by the testimony of carrier and organization witnesses and by the documents received from the Secretary of Labor.

The approach taken in the 1963 negotiations followed the recommendations of Emergency Board No. 154. That Board defined the real issue as the "choice of the most appropriate mechanism for adjusting any undermanning or overmanning of individual crews which may exist." It concluded, as we have from the evidence before us, that crew consist was essentially a local problem, best handled by local negotiations. Emergency Board No. 154 then made these provocative suggestions:

"It should be possible for the parties in direct bargaining to establish guidelines nationally to provide over-all direction for these local negotiations. These guidelines ought to be based on considerations of safety and ef-

iciency and of undue burden on other members of the crew. Alleged violation of these guidelines would then be discussed locally."

[fol. 168] It suggested further that if negotiations failed to resolve the matter, submission to a special referee procedure should be provided.

It is unnecessary to describe in detail the changes in positions of the respective parties as bargaining continued during the summer months. During the summer months both parties had accepted the general approaches recommended by the Emergency Board, and, by August 2, 1963, were bargaining within the following framework of an agreement: (1) the remanding of the crew consist issue to the local properties for negotiations; (2) the adoption of a provisional rule pending agreement at the local level; (3) acceptance of the principle that the rule would provide an opportunity for review of, and possible changes in, the consist of crews in some classes of service, and would foreclose review and change in other classes of service; (4) the development of national guidelines, some of a general nature and some applicable to specific types of service; (5) acceptance of the principle that the merits of any proposed changes in crew consist were to be determined by reference to these guidelines; (6) the referral to a special board of adjustment for final decision of any disputes arising over the application of the guidelines; and (7) provision for employee protection by application of an attrition principle.

[fol. 169] It is not suggested that the parties were irrevocably committed to these basic approaches. We recognize, of course, that their acceptance was conditional upon successful resolution of other substantive matters. Nevertheless, bargaining within this framework represented in itself a substantial narrowing of the areas of disagreement. It was impressive indication of the parties' willingness, in the interest of reaching agreement, to depart from their extreme positions, as expressed in the original notices.

Tentative agreement was reached on substantive matters to be included in a final settlement. It was agreed that all situations other than those involving a crew consist of one conductor (foreman) and two brakemen (helpers) would be reviewable. So-called "one-and-two" situations would remain unchanged. Thus, the organizations could seek changes on the basis of alleged undermanning if the present rule or practice called for only one brakeman or helper. The carrier, for example, could seek change on the basis of alleged overmanning if the present rule or practice called for three or more brakemen or helpers. In either case, the guidelines were to govern in deciding the merits of the change sought. Most of the details of the review procedure, other than time limitations for observance of the procedural steps, were worked out successfully. Perhaps of paramount importance was the tentative agreement reached on approximately twenty guidelines, as to which the parties differed only on minor matters of substance or language.

[fol. 170] Except for minor modifications, our award reflects each one of these tentative agreements, both in matters of approach and in matters of substance. The progress made by the parties through their own efforts and with the assistance of the Secretary of Labor, the Assistant Secretary of Labor, and the Chairman of the National Mediation Board constituted a long stride toward settlement. We have given due considerations to these tentative agreements in compliance with the statute. We have adopted them in our award because they are consistent with our understanding of the merits of the issue on the basis of the record before us. To the guidelines tentatively agreed upon by the parties, we have added one, necessitated by the terms of our award on the fireman issue. It requires that the parties and the system boards of adjustment take into account the presence or absence of a fireman as it may affect the adequacy of crew size.

Our principal task has been the resolution of those matters of substance about which there was disagreement. There were two such matters. The first, and more impor-

tant, concerned which crews would be subject to review and possible change where the present stipulated composition was one conductor (foreman) and two brakemen (helpers). The second concerned the exact nature of the attrition principle to be followed.

With respect to the first area of disagreement, the carriers maintained consistently during the 1963 summer negotiations that all yard crew consists should be reviewable, regardless of the present size of the consist; they also insisted that, in road service, review and change of "one-and-two" situations should be permitted on branch lines, sec- [fol. 171] ondary main lines, and main lines on which centralized traffic control (CTC) and similar electronic equipment had been installed. In the meetings in late July and thereafter the discussion centered mostly on the inclusion of "secondary main lines," certainly not a term of art recognized in the industry. The organizations sought a definition of what would be involved in secondary main lines. On the basis of the definition given by the carriers, an organization witness concluded that this "would mean an attack on all road crews on what would be about 90 per cent of all tracks outside of yards in this country." The carriers did not challenge this estimate.

The organizations finally expressed a willingness to accept review and change of "one-and-two" situations on branch lines. They were willing to negotiate the question of secondary main lines, but only when a meaningful or reliable definition of the term was given by the carriers. In addition, they remained firm in their position that only a crew consist of other than "one-and-two" should be reviewable in yard service assignments.

It is evident that this area of disagreement was, as of August 2, 1963, and at the time of our hearings, the principal obstacle to the successful resolution of the crew consist issue. That the companion fireman issue remained unsettled was an additional obstacle.

[fol. 172] It is our belief that review and possible change in the size of yard service crews should be permitted even

in the "one-and-two" situations. Variability of yard assignments and environmental factors is so great that it would be quite feasible for some assignments to be handled by a conductor and one helper without any impairment of safety and without imposition of undue burden on the remaining crew members. In the case of branch line road service crews, we are similarly convinced that review should be allowed, regardless of existing rules as to crew consist. On some branch lines only one train of a few cars operates each day. The carriers made a persuasive showing that under these circumstances it may be adequate to have one brakeman stationed in the locomotive and have the conductor in the caboose. Furthermore, the organizations' offer to permit a broad review of branch line assignments cannot be ignored.

Whether the vaguely-defined "secondary main lines" and main line road service protected by automatic block signals, CTC, or other automatic control equipment, should be treated similarly is a more difficult problem. We have concluded that review and change on these assignments should be limited to consist of crews that involve more or less than two trainmen, and that rules or practices requiring two trainmen should remain unchanged for the duration of the Board's award.

There are several reasons for this conclusion. The first is the practical consideration of controlling the number of potential cases to be heard by the special boards of adjustment [fol. 173] during the life of this award. Although the number of jobs subject to review is likely to be a relatively small percentage of the total train service jobs, and although it is expected that the guidelines will yield a substantial number of negotiated settlements, nevertheless the arbitration burden could be considerable. As a result of the evidence submitted, we are also of the opinion that the justification for downward deviation from the "one-and-two" consist in over-the-road operations was less convincing. Finally, with respect to the category of secondary main lines, at no time did that classification become meaningful to us.

The definition submitted by the carriers was ambiguous, and there was no testimony or evidence to show that secondary main lines, as such, involved a serious overmanning problem. In denying the review of present one-and-two situations in these categories of road service, we are not saying that no overmanning or undermanning exists. We are saying only that, for the reasons indicated, it would be wiser to maintain the status quo during the effective period of this award.

The second area of disagreement concerns the application of the attrition principle. Both parties agreed that the actual elimination of jobs found to be unnecessary should be governed by the processes of "natural attrition". The carriers, however, considered this to mean that no employee on the active payroll should lose his employment by reason of job elimination, but when such an employee retired or left his employment for other reasons, he would not have to be replaced if there was a job in the seniority district marked for elimination. The organizations wanted not only [fol. 174] present employees to be protected, but also any employees who maintained a seniority relationship in the industry. Thus, those employees on furlough, some of whom might have been on furlough status for a long time, would have to be offered jobs vacated by retirements, deaths, or terminations before any of the unnecessary jobs could be eliminated.

The August 2 document provided that an "employee employed or having an employee relation with the carrier on the date of this agreement" was to be a "protected" employee, and that no job could be eliminated when to do so would result in a "protected" employee being deprived of employment. This language was derived from an organizations' proposal submitted on July 2, 1963. The organizations assert that there was agreement on this approach to attrition, basing their conclusion on statements by carrier spokesmen in negotiations and before Congressional committees that they accepted the principle of full attrition. The carriers deny that there was agreement on the attrition formula as stated in the August 2, 1963, proposal.

The record before us leads to the conclusion that there was never an agreement between the parties on the exact scope of the attrition principle. Unfortunately, there was little discussion of the matter in the negotiations; the parties were preoccupied more with the scope of the review procedure and the development of guidelines. However, an organization witness testified under direct examination that on June 18 the principal negotiator for the carriers said he "would not be opposed to protect the present regular workforce, but he would be opposed to protection of extra men or employees furloughed." This statement was repeated in a meeting on July 1. This same organization witness, in response to a question by a Board member, said [fol. 175] it was correct to say there was "a firm agreement on attrition, provided extra men and furloughed men would not be considered."

In our handling of this issue, as well as the fireman issue, we have adopted the view that the effect of our award should not result in serious hardship to those men who have been attached to the industry for any considerable length of time. Because the number of brakemen and helpers jobs that are likely to be eliminated is such a small percentage of total employment in these crafts, the attrition principle is the fairest method of controlling job elimination.

Our award provides that all employees, other than those on furlough on the date the award becomes effective, are to be regarded as "protected employees." A "protected" employee is to continue as an active employee until he quits, retires, dies, or is discharged for cause. In no way will his employment rights be affected adversely by the award. However, we do not believe that the elimination of a job through natural attrition should be delayed by extending "protected" status to those men who are on furlough as of the effective date of the award. These men will not, as of that date, have a job. In effect, their position is unchanged. They remain on the seniority list and retain any recall rights they now possess. They are affected only if, and to

the extent, that the number of jobs to which they might have been recalled will be reduced as a result of this award. The selection of the effective date of the award as the time for determining which employees are to be given protected status seems to us to be reasonable. The determination [fol. 176] should be made before the review procedure is implemented, and there is little purpose in making the determination prior to the date provided.

Washington, D. C.

November 26, 1963

[fol. 177]

BEFORE THE ARBITRATION BOARD

Established by Joint Resolution of Congress

Approved August 28, 1963

Public Law 88-108

National Mediation Board

Arbitration Board No. 282

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN,
AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES
and

CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHER-
HOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCO-
MOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH
AMERICA

STATEMENT SUBMITTED BY CARRIER REPRESENTATIVES

[fol. 178]

STATEMENT OF THE MEMBERS OF THE BOARD NAMED
BY THE CARRIERS

We have been impressed by the extraordinary ability of the members of the Board that were named by the President of the United States, and by the care and diligence which they have shown in their efforts to make a fair and just award. To the extent that the award might be claimed to be deficient in these respects, this is not due to any lack of effort or fairness on the part of the neutral members of the Board, but must be attributed to the complexity of the subject matter involved and time limitations imposed upon the Board by the statute pursuant to which it was created.

While we subscribe to and have affixed our signatures to the award of the Board, we think it appropriate to point out that we are disappointed with certain of its provisions. We feel that the provisions of the award affording protective provision and other transitional benefits for unneeded employees are unduly and unnecessarily burdensome upon the carriers, and provide benefits for the employees involved to which they are not justly entitled. The carriers' proposals, which were referred to the Arbitration Board by Public Law 88-108, were served, pursuant to the provisions of the Railway Labor Act, on November 2, 1959. The unions [fol. 179] by refusing to bargain, by resort to groundless litigation, and by other devices have delayed disposition of the issues involved for more than four years. During this period the carriers have been required, under existing rules, to hire many unneeded firemen, trainmen, brakemen and helpers who are covered by the protective provisions of the award, although such employees accepted employment with knowledge of the pendency of the carriers' proposals to eliminate the positions which they now hold.

We are also disappointed with the provisions of the award which preclude the elimination of many redundant positions in train crews used in main line road service.

Notwithstanding the foregoing, we are deeply appreciative of the conscientious, able and diligent efforts of the

neutral members of the Board to reach a fair and just award; and being fully aware that the award will eliminate much of the unjustifiable waste of manpower and money resulting from the application of existing rules and practices complained of by the carriers, we have affixed our signatures to the award in the manner and as provided by law to constitute a valid and binding award.

J. E. Wolfe, G. W. Knight, Members of the Board
Named by the Carriers.

[fol. 180]

BEFORE THE ARBITRATION BOARD

Established by Joint Resolution of Congress

Approved August 28, 1963

Public Law 88-108

National Mediation Board

Arbitration Board No. 282

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN,
AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES
and

CERTAIN OF THEIR EMPLOYEES REPRESENTED BY THE BROTHER-
HOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCO-
MOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY
CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, AND THE SWITCHMEN'S UNION OF NORTH
AMERICA

STATEMENT AND DISSENT OF ORGANIZATION MEMBER
R. H. McDONALD

[fol. 181] STATEMENT AND DISSENT
OF BOARD MEMBER R. H. McDONALD

I disagree with the decision of the Majority of the Board and strongly dissent from the award.

This Board, established by Act of Congress (Public Law 88-108), carried out a compulsory procedure which was imposed upon the parties to a labor dispute in private industry. The procedure was imposed, not because of any actual emergency affecting public interest, but merely upon the pure assumption that a national emergency might develop if the parties were permitted to proceed to exercise their rights under the existing federal law (the Railway Labor Act). It is a concern to me, in making this dissent, that the Railway Labor Act has to some extent been set aside by the action of Congress in passing Public Law 88-108, insofar as these parties are concerned. At the same time, it should be remembered, other labor organizations covered by the Railway Labor Act are not so restricted.

The legislative history, as well as the text, of Public Law 88-108 leaves no room for doubt that the compulsory arbitration procedure it imposed was forced upon the employee parties unwillingly and without their consent, while at the same time that arbitration procedure was being actively solicited by the management parties, who must have felt that they would thus be in a position to obtain special advantages in accomplishing the desired changes in the existing work rules, subject of this dispute.

The decision of this Board does not prove the carriers were wrong in their expectations. Instead, it provides one more justification for the fears the labor movement has for compulsory arbitration as a means of settlement of a dispute with management.

Since this Arbitration Board was created under the above circumstances, it was particularly appropriate for the Board to conduct its work and, above all, formulate its award, strictly as Congress intended. I submit that under the terms of Public Law 88-108, the Board was obligated to carefully follow its directives to incorporate in its decision

any matters on which it found the parties were in agreement, to give due consideration to those matters on which the parties were in tentative agreement, and to resolve the matters on which the parties were not in agreement.

This Board was likewise directed to give due consideration to the narrowing of the areas of disagreement which had been accomplished in collective bargaining and in mediation. Particularly, the Law directed that the Board should use as the key document for the guidance of the Board, the statement to the parties of Secretary of Labor W. Willard Wirtz dated August 2, 1963, and his memorandums and other data furnished by him.

[fol. 183] The Majority, in making their Award, have not followed the directives of Public Law 88-108 as Congress stipulated. The Majority have declined to recognize that the burden of proof was not met by the carriers, who failed to prove their case by probative evidence. The Board has likewise failed to take into account the unrefuted testimony of the witnesses who testified as to the areas of agreement between the parties in the negotiations.

The Award is hardly recognizable as having any resemblance to the August 2, 1963 document (Wirtz Exhibit A) which represented the close approach of the parties to agreement which Congress found it to be, and which Congress intended this Board to follow.

In my opinion, a number of errors have been committed by the Board in its Award. Some, but not all, of these errors are being briefly stated as follows:

Both the Presidential Railroad Commission and the President's Emergency Board No. 154 recognized that the generally accepted crew consist in the industry is a conductor (foreman) and two brakemen (helpers). Evidence placed before Arbitration Board No. 282 abundantly justified the adoption of the provisions of the Wirtz document of August 2, 1963 which would have limited the review of crew consists in both road and yard service to those crews having more or less than two brakemen (helpers). The Board has erred in deciding to adopt this provision (in an incon-

[fol. 184] sistently rewritten form) to cover some road crews and omit any coverage whatever for yard crews. The result will bring havoc to the industry, since it will enable these carriers to promiscuously attack any yard crew consist, regardless of its size or lack of justification for review.

While the organizations did tentatively agree to the establishment of special boards of adjustment to decide on alleged over-manning or under-manning, this was to have been limited to review of situations where the crew consist was more or less than a conductor (foreman) and two brakemen (helpers). This Board, by failing to make a disposition of the crew consist in yard service and in lieu thereof delegating to another compulsory arbitration board the issue of crew consist in yard service, has failed to carry out the mandate of Congress. This Board is delegating to another Board or Boards the responsibility for disposition of the crew consist issue in yard service.

Likewise, the Board erred again in writing a provision into its Award which could and probably will place a severe financial burden upon the employees. Half the cost of the neutral member of these special boards of adjustment, as designated by this Board in its Award, must be borne by these employees. Win or lose, they will be taxed severely for the efforts of these carriers to decimate the consist of [fol. 185] operating crews. Such an expense is both unjustified and is contrary to uncontested evidence placed before this Board.

There was actually no dispute between the parties over the manner in which the three members of the special boards of adjustments were to be paid. Since that procedure had been fully agreed upon under the auspices of the Department of Labor and the National Mediation Board, and since it was a part of the August 2, 1963 document and also a part of the carrier document dated August 11, 1963 (which constituted further proof of agreement of the parties), the refusal of the Majority to incorporate that provision into its Award constitutes a violation of the authority of the Board under Public Law 88-108.

Emergency Board No. 154 had specifically recommended in the Crew Consist Issue that no force reductions in this area should be made except by natural attrition. Repeatedly, Mr. J. E. Wolfe, the carrier representative, testified to the Congress in the hearings leading to the enactment of Public Law 88-108 that the railroads accepted the report and recommendations of Emergency Board No. 154. Mr. Wolfe further testified and stated as follows in the Senate Commerce Committee hearings on July 31, 1963, S. J. Res. 102, Page 669:

“Now as to the consist of crew issue, involving yardmen, brakemen, and road brakemen, *we accept natural attrition without qualification.*” Emphasis supplied.

[fol. 186] In spite of all this, unquestionably proof of carrier acceptance, the Majority has now written into its Award a so-called employee protection provision which not only fails to provide the qualified natural attrition recommended by Emergency Board No. 154 and which the carrier representative, Mr. Wolfe, told the U. S. Senate that the carriers had accepted without qualification, but it likewise imposes certain new restrictive provisions upon these employees which were never previously proposed by the carriers nor discussed by the parties, never having been any part of the negotiations relating to crew consist. This Board was without authority to go beyond the scope of its jurisdiction as provided by the law under which it was created, and I took strong exceptions to this action by the Majority, which I repeat here. Mr. Wolfe's unqualified acceptance of natural attrition conformed to the provision which had been incorporated into the Wirtz document of August 2, 1963, and under the directive of Congress, it should have been made a part of this Award.

Finally, I would point out that the provisions of the August 2, 1963 Wirtz document setting out the guidelines to be followed by the special boards of adjustment in adjudicating a crew consist dispute had been the subject of exten-

sive negotiations and had been agreed upon in virtually every particular. Secretary Wirtz's Memorandum to the [fol. 187] Arbitration Board No. 282, stated that they were in "substantial agreement." Testimony before the Board revealed clearly exactly which of these guidelines were agreed upon and which were not. Yet the Majority has made several changes in these agreed-to guidelines, and has added new language which tends to change the meaning of the agreed upon provisions, and has even added additional guidelines which had been discussed but eliminated from the picture in the negotiations. I understand the provisions of Public Law No. 88-108 stating that this Board shall "incorporate in its decision any matters on which it finds the parties were in agreement . . ." to mean exactly that. Those agreed-to guidelines should have been incorporated into the decision intact. The result of the Majority's action is detrimental to the employees, parties to this dispute.

This Award, adopted by the Majority, is a rebuke to the Congress. It makes an unfair disposition of the matters entrusted to the Board's judgment and is definitely contrary to my understanding of the intent of Public Law 88-108. I feel that the Award is such that it will cause unwarranted injury and loss to the employees covered by the decision. Therefore, I am obliged to make known my disagreement with the Majority so as to fully advise the representatives of the organizations concerned.

Respectfully submitted,

R. H. McDonald.

[fol. 188]

BEFORE THE ARBITRATION BOARD

Established by Joint Resolution of Congress

Approved August 26, 1963

Public Law 88-108

DISSENT OF H. E. GILBERT, PRESIDENT OF THE BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND MEMBER
OF THE ARBITRATION BOARD APPOINTED UNDER PUBLIC LAW
88-108

September-November, 1963

[fol. 189]

BEFORE THE ARBITRATION BOARD

Established by Joint Resolution of Congress

Approved August 28, 1963

Public Law 108

DISSENT OF H. E. GILBERT, PRESIDENT OF THE BROTHERHOOD
OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND EN-
GINEMEN, AND A MEMBER OF THE BOARD OF ARBITRATION
APPOINTED UNDER PUBLIC LAW 88-108

I wish to record my dissent from the award of the Board. I dissent because I believe that the Board has grossly exceeded its jurisdiction and, moreover, convinced as I am of the essentiality of the job of fireman (helper), I must disagree with an award which fails to accord the job the essentiality due it. I will briefly set forth herein some of my views respecting the Board's award. Limitations of time prevent my going into greater detail.

It seems to me that Congress was most explicit in its conferral of minimal jurisdiction upon the Board. These limitations on our powers have gone unheeded by the majority of the Board despite the clarity of the Congressional commands to us.

The award, in my judgment, is in plain violation of the mandate of Public Law 88-108. That Act specifically pro-

vides that the arbitration board shall confine its efforts to resolving only those matters as to which the parties were in disagreement concerning the Secretary of Labor's suggestions of August 2, 1963. The legislative history and the Act itself in Section 7, refer to narrowing of the areas of disagreement. The intention of Congress was to keep the arbitration within the limited confines of those areas of disagreement [fol. 190] arising from the Secretary's suggestions of August 2, 1963. The extent of the Board's departure from the expressed will of Congress becomes evident even from a cursory examination of the award of the Board. For the award, insofar as the fireman (helper) issue was concerned, bears little resemblance to the August 2, 1963, suggestions (or proposal) or to the report of Emergency Board No. 154 from which the Secretary drew in large part, as stated in his memorandum to the Board of September 23, 1963, in preparing the August 2, 1963, document. The August 2, 1963, document has been thrust aside by the Board.

Congress was acutely aware of the unprecedented character of its sanctioning for the first time in the history of this country the compulsory arbitration of a labor dispute. In order to preserve to the maximum extent the collective bargaining relationship, Congress carefully circumscribed the limits beyond which the Board could not go. The award of the Board penetrates far beyond those limits.

In my judgment the Board's award is not only illegal—it is unwise. It adopts an approach, so far as solution of the fireman (helper) problem is concerned, completely different from the carefully conceived suggestions of the Secretary of Labor made in the papers of August 2, 1963, arrived at after the Secretary of Labor's participation in lengthy mediatory efforts. The award disregards and casts aside the progress made in negotiations by the parties. It disregards the recommendations of Emergency Board No. 154. It does precisely what Congress wanted to avoid—the promulgation of an *ad hoc* decision as to what is best for the [fol. 191] parties arrived at independently of the progress

made by the parties themselves in application of their own expertise in the collective bargaining process. The award imposes a judgment contrary to the standards created by the Act for guidance of the Board. It disregards the record made in the hearings conducted by the Board. It disregards the Congressional command that the Board give due consideration to the effect of the proposed award upon safe transportation service; instead the Board has provided that the elimination of jobs of firemen (helpers) shall be within the power of the *railroads* based upon their own judgment of considerations of safety and safe transportation service to the public.

The Board is a creature of Public Law 88-108. Its authority, jurisdiction, tasks, and governing standards and procedure are fixed by that law. The key section of the law defining the jurisdiction of the Board is Section 3, reading as follows:

"Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matter with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve

the matters on which the parties were not in agreement, and shall, in making its award, give due consideration [fol. 192] to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration."

The language is clear that the Board shall (1) incorporate in its decision the matters on which it finds the parties were in agreement, (2) that it "shall resolve the matters on which it finds the parties were not in agreement," and (3) shall give due consideration to those matters on which the parties were in tentative agreement.

Section 7 of the Act additionally provides that the Board shall give "due consideration to the narrowing of the areas of agreement which has been accomplished in bargaining and mediation." The Board has acted in such a way as to disregard the basic documents in the proceedings, namely, the Secretary's papers of August 2, 1963, and the memorandum of September 23, 1963, and as if there were no matters on which the parties were in agreement and as though there was no narrowing of the areas of disagreement concerning the proposals in the August 2 document.

The record of the Congressional proceedings preceding enactment of Public Law 88-108, approved August 28, 1963, makes perfectly clear that members of the Congressional committees were in continuous close touch with the Secretary of Labor concerning negotiations over the terms of the agreement between the parties based upon the August 2 document. Members of Congress were currently informed of developments in negotiations. The Act is in a real sense the product of the negotiatory efforts of the Secretary of Labor.

There can be no genuine challenge of the fact that Congress [fol. 193] understood that there were matters on which agreement had been reached, and that there had been

a narrowing of the areas of disagreement. This understanding by Congress was reached as a result of information conveyed to it by the Secretary of Labor, the Chairman of the National Mediation Board and by means of testimony given at the hearings. Accordingly, the Congress referred in Sections 3 and 7 to matters on which there had been agreement and to narrowing of areas of disagreement, and adopted the following paragraph as a preamble to the law:

"Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions;"

The Senate Committee report and the House Committee report placed identical interpretations on the Board's functions and powers under the law. A portion of the Senate Committee report reads thus:

"Section 3 would provide the means by which the dispute as to the two key issues would be presented to the Board. The Secretary of Labor would be directed to furnish certain memoranda and data which the Board would require. The Board in reaching its decision would consider areas in which the two parties were in agreement, those areas in which there was tentative agreement, and those areas where no agreement existed. The Board's decision would be final and binding on all parties to the dispute." (Senate Report 459, p. 10.)

The House Committee report explained Section 3 in like terms, as follows:

"This section requires the Secretary of Labor to furnish certain statements, memorandums, and other data to the arbitration board which relate to the two principal issues in dispute. *The arbitration board is required to*

resolve all matters in dispute and to include in its [fol. 194] decision those in which the parties were in agreement. This award is made binding on the parties and is a complete and final disposition of the two major issues; use of firemen (helpers), and consist of road and yard crews.

"The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains." (H.R. 713, p. 14.)

A discussion occurred on the floor of the House of Representatives between Congressman Staggers and Congressman Harris, Chairman of the Interstate and Foreign Commerce Committee, and manager of the bill on the floor, regarding the preamble above quoted and certain parts of Section 3. The colloquy was as follows:

"Mr. Staggers. * * * Mr. Chairman, this portion of the preamble now means that there were certain agreements reached then by both sides in the preamble?

"Mr. Harris. As far as the issues involved here are concerned, which I insist that we keep in mind, there were certain parts of those issues on which agreement had been reached. There were certain parts of them on which no agreement had been reached. So the gentleman is correct.

* * *

"MR. STAGGERS. In the amendment which has been offered by the gentleman from Arkansas the following is stated:

The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement.

"That means as of that date?

"MR. HARRIS. That is direction to the arbitration board of standards which the Congress establishes for the board to follow:

"MR. STAGGERS. And, also further continuing:

Shall resolve the matters on which the parties were not in agreement.

"MR. HARRIS. That is the major purpose of this resolution.

[fol. 195] "MR. STAGGERS. One further question with respect to this. There is also the statement:

Shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement.

"MR. HARRIS. That is a direction to the board.

"MR. STAGGERS. That would be the intent of this resolution, and it should be carried forth.

"MR. HARRIS. Not only a direction, but the act would so provide."

I wish to call special attention to Chairman Harris' statement that "the major purpose of this resolution" is that the Board "shall resolve the matters on which the parties were not in agreement."

I do not think it necessary to refer further to the legislative history, for it clearly appears from the Act itself, the reports of the Congressional committees to which the Act was referred, and from the comments of the sponsors of the Act on the floors of the Senate and House that Congress was charging this Board, after the receipt of the Secretary of Labor's memorandum, to incorporate in the award the areas of agreement and resolve the matters on which the parties were not in agreement, as respects the August 2, 1963, document. This Board was given no other powers.

Although Congress was informed of the existence of agreements and areas of disagreement, neither the matters on which agreement was reached nor the precise areas of disagreement were delineated in the Congressional debates or in the Act. The Act provides that the Board be advised of such matters by the Secretary of Labor. (See the first

sentence of Section 3). It was anticipated that the Board [fol. 196] would be informed knowledgeably, authoritatively and impartially of the specific areas of agreement, disagreement and tentative agreement by means of a memorandum required to be furnished the Board by the Secretary of Labor. It was in recognition of the Secretary's unique qualifications, obtained in the course of extensive and intimate attention to the dispute, that Congress selected and directed him to transmit to the Board a statement of the matters which are basic to the rendition of a proper award.

Congress commanded this Board to operate within the four corners of the Secretary of Labor's document of August 2, 1963, over which the parties had collectively bargained under the Secretary's auspices. In his memorandum to the Board of September 23, 1963, the Secretary records agreement on important elements of the August 2, 1963, suggestions listed in seven divisions which I will in due course quote in full. These seven points of agreement have never been challenged by the railroads except on an extremely technical basis. Perhaps I should say parenthetically at this point that both the railroads and the railway labor organizations were agreed that the Board is obliged to incorporate in its award the agreements of the parties.

The testimony of the railroads that there were not in truth matters on which the parties were in agreement may be dismissed with the simple observation that the railroads have interpreted the word "agreement" in the Act as meaning an agreement reduced to writing or otherwise formalized. This patently is not the meaning of the term "agreement" in the sense it was used in Public Law 88-108. Congress used the terms "agreement" and "disagreement" to identify the status of the collective bargaining negotiations between the parties. The collective bargaining agreement is normally the end result of the collective bargaining [fol. 197] process during which issues are agreed to by the parties until finally all matters separating them are disposed of and they are then in position to execute the final docu-

ment. It would seem patent that if an agreement within the sense of the railroad's definition had been reached, there would have been no occasion for enactment of the law, for the labor dispute would have been settled. Thus it becomes manifest that Congress was using "agreement" in its collective bargaining sense, and not in the contract sense which the railroads urge.

Before setting forth the areas of agreement and disagreement concerning the August 2, 1963, proposal as reported by the Secretary of Labor, it appears advisable to outline the main features of the August 2 document. That document was captioned "Fireman (Helper) Issue", and attached to it was the Secretary's "Statement to the Parties." In his statement the Secretary urged that negotiations over his proposals commence immediately. The August 2, 1963, proposals provide for the following:

1. That the agreement shall be for a stipulated period commencing August 15, 1963, and expiring either on August 14, 1965, or August 14, 1966, as the parties may agree upon (Paragraph A.)
2. That, in the event no fireman-helper on the fireman-helper seniority list is available to fill a fireman-helper job, the carrier may blank the job if it falls within certain categories specified and in the sequence set forth, subject only to the challenge that the job did not fall within the specified categories or that the prescribed sequence had been departed from. (Paragraph B-1.)
3. That, in the event no fireman-helper on the fireman-helper seniority list is available to fill a fireman-helper job, the carrier may blank the job if it falls within specified categories (in this case certain described branch line jobs, second trick yard service jobs, and local freight service jobs), provided all jobs covered by Paragraph B-1 have been blanked, and it is first determined by special board of adjustment procedure that the blanking of the job will not endanger safety or unduly burden other employees. (Paragraph B-2.)

[fol. 198] 4. That disputes as to what jobs may be blanked arising under Paragraphs B-1 and B-2 may be submitted by either party to a special board of adjustment, to be established under the Railway Labor Act, for review and decision.

5. That jobs in certain defined categories shall be exempt from being blanked and hence may not be blanked under any circumstances except by agreement between the carrier and brotherhood. (Paragraph B-3.)

6. That, in the event the number of jobs blanked equals a certain percentage (to be agreed upon) of the fireman-helper jobs in road freight and yard service of a carrier on a specified date, no additional jobs will be blanked during the period of the agreement. (Paragraph B-5.) (This is sometimes referred to as the provision for an "overall limitation" on the number of jobs which could be blanked during the term of the agreement.)

7. That firemen-helpers presently holding seniority shall have certain described job rights, and that certain protective conditions and emoluments shall be provided in various cases, including assumption by the carrier of costs of relocation, requalification, retraining and guaranteed earnings.

8. That a National Joint Board be established composed of representatives of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and the carriers, to make a continuing study of the fireman-helper issue and of the experience developing under administration of the agreement, such board to make recommendations for the future handling of the issue without having decisional authority.

As has been stated, negotiations were conducted by the parties, with the Secretary of Labor as mediator, concern-

ing these proposals made in the Secretary's August 2 papers and the Secretary has reported the seven divisions of agreement in his memorandum to the Board in terms as follows:

(a) The principle of blanking a fireman (helper) job if, but only if, there is no fireman (helper) on the fireman (helper) seniority list available to fill a vacancy which develops, if filling the vacancy would require a new hire and if blanking the job will not unduly endanger safety or unduly burden other employees was accepted by both parties. (See Paragraphs A-1, A-4, and B.)

(b) The principle that certain categories of jobs can be agreed upon in advance as not requiring case-by-case review to determine safety and undue burden (so that review is to be limited only to determination of whether a job falls in these categories) was recognized by both parties. (See Paragraph B-1.)

[fol. 199] (c) There was mutual acceptance of the concept of making jobs other than those falling in the categories referred to in the preceding paragraph blankable only after agreement or Special Board review of any disputed safety and undue burden issue. (See Paragraph B-2.)

(d) There was mutual acceptance of the Special Review procedure to cover individual cases. (See Paragraphs B-1-b and B-2-b.)

(e) There was mutual acceptance of the principle of blanking jobs only in the order of a sequence of categories, with provision to be made to cover situations in which jobs become vacant in an order different from the order of the sequence. (See Paragraphs B-1, B-2, and B-4; the latter as modified in discussion.)

(f) There was substantial acceptance of the principles of the "employee job rights" provisions as set forth in Paragraph C.

(g) The bilateral Joint Board suggestion was accepted by both parties (but with disagreement about the effect to be given its determinations, and with little discussion of details of its functioning).

Despite the command of Section 3 of the Act, the Board has failed to incorporate in its decision the following relevant matters on which the parties were reported by the Secretary of Labor to be in agreement on the contents of the August 2 documents:

1. The principle that certain categories of jobs can be agreed upon in advance as not requiring case-by-case review to determine safety and undue burden.
2. The concept of making jobs falling in the categories referred to in the preceding paragraph blank only after agreement or special board review.
3. The principle of special board review procedures.
4. The principle of blanking in the way of a sequence of categories.
5. The principle of the "employee job-rights" provisions as they were discussed and substantially accepted in relation to the balance of the provisions contained in the August 2 proposals.

[fol. 200] The Secretary of Labor reported to the Board that "Three major differences separated the parties," only two of which are presently relevant, namely, whether there should be in the August 2, 1963, proposed agreement (1) a provision for an overall limitation on the number of fireman (helper) jobs which can be blanked, and (2) provisions permitting the exemption of certain jobs from any blanking whatsoever. These are matters which the Board was directed to resolve. It has not done so. Neither has it incorporated in its Award the matters on which the parties were in agreement, in the respects above mentioned, and also in the respects which I will now discuss, particularly as regards the job rights of employees.

DEPARTURES FROM AGREEMENTS CONCERNING JOB RIGHTS OF EMPLOYEES

The departures by Board No. 282 from the employee job rights principles referred to in the Secretary's memorandum of September 23, 1963, as being matters of "substantial acceptance," are numerous and the limited time available to me will not permit either an exhaustive or complete discussion. It will be recalled that the Secretary of Labor has reported to this Board that his August 2 document was prepared in large part by drawing upon the report of Emergency Board No. 154, among other papers. An overriding principle in the report of the Emergency Board was that no job could be blanked under any circumstances unless it would require a new hire. In pursuit of this principle the Emergency Board, when dealing with the job rights of the individual, stated that an employee "may" have his job rights terminated under certain circumstances; however, in all cases, except for the so-called short hire employee, it provided for options to be selected by the individual employee involved.

[fol. 201] The Secretary's proposal of August 2 carried over these principles into a section entitled "employee job rights" (Section C), with the exception that employees who had performed no service since a date to be specified would have their employment terminated with no severance allowance. It was pointed out in early discussions by representatives of the employees with the Secretary that there could and would be many firemen in this category, who to a large extent would be in the older age groups, and hence should be accorded preferential rehiring rights. During a conference held August 6, 1963, the appropriate language was inserted in the papers of August 2 and at no time did the carriers raise objection, this indicating to me that this was a matter of agreement or tentative agreement. This agreement, contrary to the Act, has not been incorporated in the award of the Board.

In Section A-3 of the papers of August 2 the Secretary proposed that firemen (helpers) who have obtained employ-

ment on or after a date to be specified, could have their employment terminated with such benefits as they would be entitled to under paragraph C. The relevant part of paragraph C is Section C-2, relating to firemen having less than 10 years seniority and providing that such firemen could continue their employment unless and until offered a comparable job by the carrier, in which instance they would have the option of accepting the transfer or retaining fireman seniority rights. In the event that the junior employee on the seniority roster failed to accept the job offer, his employment could be terminated with one-half sum settlement as provided in the Washington Agreement. The carriers often announced their acceptance of the August 2 document in principle. This portion of the Secretary's papers, although agreed upon in principle, has not [fol. 202] been incorporated in the award of this Board, again in derogation of the Act.

In Section C-2 of the Secretary's proposal of August 2 only the junior employee on the seniority list would be required to accept the job offer just referred to on pain of having his seniority terminated if he did not. Stated in another way, only one fireman could be eliminated for each job offered. Paragraph C-6 of the award of this Board constitutes a departure from this principle. Paragraph C-6 would permit the carriers to move upward on the seniority roster step-by-step from the junior man refusing to accept a job transfer until some fireman on the seniority district with less than 10 years seniority elected to accept transfer. Conceivably, all firemen with less than 10 years rights could be eliminated on the particular seniority district. The award of the Board would then permit the carrier to pursue the same process on the next adjacent seniority district. Instead of the possibility of a single fireman's rights being eliminated, the award of the Board opens the way to probabilities of many firemen's rights being terminated with each job offered.

In connection with paragraph C-2 of the proposal of the Secretary, the organizations proposed that the job offered

should be a comparable job such as that of brakeman, switchman or clerk, and that there should be assurances of some degree of performance. At no time did the carriers make objection to our suggestions. I would regard this as an agreement at least in principle on the part of the carriers. The award of the Board, again in violation of the Act, fails to require assurance of any sort of permanency for the job thus offered.

[fol. 203] There are other vital respects in which the Board has detached itself from the August 2 proposal and the agreements of the parties in relation thereto. Section D-1 of the award of the Board would limit the rights of employees hired prior to a date two years prior to the effective date of the award, with average monthly earnings set forth in part C-3 to passenger service, hostler and hostler-helper service, and to the 10% of the jobs which had been vetoed for blanking, and to service as engineer for which he is qualified. No such limitation was contained in section C-2 of the August 2 proposals. This limitation is a creature of this Board and there is, in my judgment, a most serious question of the right of the Board to render an award impinging upon or so restricting the vested seniority rights of the employees. I think it should be pointed out that the August 2 document provided that the employees falling within the category under discussion should remain on the seniority list and available for any jobs for which they are qualified.

The carriers consistently accepted the continued use of firemen in passenger diesel operations. Under Section B-3 of the Secretary of Labor's proposal, it would not have been proper to eliminate a job involved in the switching of occupied passenger equipment. To the best of my knowledge, the carriers were in accord and no questions were raised by them during conferences. There are in existence many large terminal companies engaged predominantly in switching passenger equipment, on which many hundreds of firemen are presently employed. As we understand the award of this Board, firemen could be eliminated on up to 90%

of these jobs. I do not believe that such a result can be sanctioned responsibly. I should say in addition that under the Secretary's proposal (B-3), jobs on which more [fol. 204] than two units of motive power were used were to be unblankable. No objection thereto was voiced by the carriers, with the exception that they urged that through freight jobs should be moved from the unblankable category in B-3 into the exposed category of B-2-A, following the expiration of 18 months.

In sum, the Board's departures from the strictures of Public Law 88-108 and in particular its failures to incorporate the agreements of the parties and to give due weight to the narrowing of the areas of disagreement are numerous and serious.

[fol. 205] THE EVIDENCE OF RECORD PROVES THE ESSENTIALITY OF THE FIREMAN (HELPER)

I come next to the merits of the Board's resolution of the dispute. I begin with some general observations.

As a preface I point to the record which undeniably establishes three key facts. In this proceeding the carriers did not deny that the fireman (helper) has work to do. Their position was as stated by Emergency Board 154 "Also, they (the carriers) do not contend that the bulk of the work performed by firemen on freight diesels is not needed—left-hand lookout, communication of signals to the engineer, and the detection and correction of locomotive malfunctions. They contend only that such work can be combined with other work performed by employees in other classifications, * * *". Second is the recognition by the carriers with respect to the crew consist question that the size of the crew consist ought to vary depending upon density of traffic, physical characteristics of yards and line of road, operating methods, operating conditions and the nature of the service performed. Third, the engine crew and the ground crew are part of one team. They are the operating employees responsible for getting the train over the road and for the movements of trains in the yards.

1. The award permits the carriers to propose the elimination of any number of firemen (helper) jobs in a seniority district and permits the organizations to designate no more than 10% of such jobs for retention. This "solution" as I have pointed out previously, clearly exceeds the jurisdiction of the Board since it ignores the parties' agreements and tentative agreements concerning the August 2 memorandum of the Secretary of Labor. It is arbitrary and without foundation in the record before the Board.

[fol. 206] Just where the Board got the 10% figure is a matter of considerable mystery. It never came up in the discussions with the Secretary of Labor, nor was it ever discussed or considered in the hearings before the Board. The record made before the Board established the great variety of operating circumstances in railroading. It provided no basis for generalization in terms of any percentage as to the essentiality of the fireman (helper).

Under the Secretary of Labor's suggestions of August 2, categories were established having some reasonable relationship between the abolition of the job and its effect upon safety, burden of work and adequacy of transportation service, the standards set forth in the Act. Because it was obvious that there was a great variety of circumstances and factors which would have to be weighed in determining the merits of the proposed abolition, a special board of adjustment was created to be available to consider such disputes. In some cases the job would remain vacant pending the arbitration and in other cases the job would remain filled pending arbitration. The Secretary's approach was a plan intended to insure a safe and adequate transportation system, and a fair and deliberate determination of employees' rights. The Board's "solution" delegates its responsibilities for applying the standards established by Public Law 88-108 to the carriers.

2. It is impossible to reconcile the Board's handling of the crew consist issue with its handling of the fireman (helper) issue. The award on the crew consist issue recog-

nizes the numerous factors which bear upon size of crew and work load. Some ten separate guidelines are set forth. All of these guidelines apply with equal force to the engine [fol. 207] crew. I am at a loss to understand how there can be any quarrel with the proposition that the size of a crew necessary to operate a train, that is, the combined engine and train crews, depends upon the varying conditions that exist.

The ultimate irony to me in the Board's award is contained in paragraph C(1)(k) of the portion of the award dealing with the crew consist. This paragraph establishes as a guideline governing the size of the crew consist the presence or absence of a fireman in the engine service crew. This criterion highlights the fatal defect of the Board's conclusion in the fireman (helper) issue. The fact, of course, is that the fireman (helper) is a most essential part of the engine crew and the Board has recognized this, unfortunately, not where it counts, that is, in relation to the fireman (helper) issue, but in relation to the crew consist issue.

3. Another aspect of the Board's award with relation to the crew consist issue which highlights the discriminatory handling of the fireman (helper) issue, is the creation of a special board to hear and determine disputes arising on local properties with relation to the size of crews.

As stated above, all of the factors which govern the size of a train crew likewise have a bearing on the functions and duties of the engine crew. They do in fact operate as one team. What justification, therefore, can there be for giving the carriers the right to arbitrarily determine what fireman (helper) positions shall be abolished and simultaneously insisting in connection with the size of the train crew that the carriers' determinations in this respect be subjected to the scrutiny of a board?

[fol. 208] There is no reason to expect that a special board would be less capable of handling disputes concerning firemen (helpers) positions than train crew positions. The type of evidence would be similar. The guidelines

specified by the Board would apply with equal force to the fireman (helper) and would suffice as proper standards to guide the special board.

As of the writing of this dissent, the text of the opinion of the majority of the Board has not been made available to me. It is, however, apparent from the award that the Board recognizes the essentiality of the fireman (helper). It also may be true that the Board does not agree with the organization that the fireman (helper) is necessary in the vast majority of positions. For these reasons, I believe a brief review of the record concerning the issue of essentiality may serve a purpose in this dissent.

In recent years trains have become increasingly longer and heavier. The average freight train of today is approximately 100 cars in length and the average number of diesel units in the consist is four. Trains of 200 and even 300 cars are not uncommon, nor is it uncommon to have as many as seven or eight diesel units in the consist to pull the train. A fact often overlooked by the public and consistently overlooked in carrier propaganda is that no matter how many units are in the consist the same two-man engine crew operates them all.

The fireman (helper) performs many important duties as a member of the engine crew. Three of these functions of the fireman (helper) received primary attention during the presentation of the case; the duty of lookout, the duty of relaying signals from the ground man when signals cannot be directly passed to the engineer, and, the detection and correction of mechanical and electrical troubles in diesel locomotives. Implicit in the award is recognition of the importance of the lookout function and its direct relationship to safety and efficiency of operation. Also implicit is acknowledgment that there are situations in which the fireman is necessary to relay signals. But it appears from the award that the Board did not fully comprehend the evidence introduced in the record with relation to the fireman (helper) function of detecting and correcting malfunctions.

I recognize that it is difficult for laymen to grasp and absorb, within a short compass of time, the complexity of the diesel-electric locomotive, the special terminology used in identifying its various parts and the unique technology of maintaining its motive power. Because of the limited time made available for the presentation of evidence and the necessity for presenting material on a great many issues, the time allowed to discussion and demonstration of this particular phase of the case by the organizations was restricted to several hours. Nevertheless, the fact is that within the limitations of time, an overwhelming record was made before this Board with relation to the correction of malfunctions.

This record to a large extent is based on testimony of supervisory personnel of the carriers (see generally EX. 7, pp. 1-139, EX. 20 and Tr. 13, 2135-2166). It is based also on the manuals put out by the locomotive manufacturers for the guidance of engine crews. For example, the operating manual put out by the Electro-Motive Division of the General Motors Corporation for the GP-9 model diesel [fol. 210] electric locomotive, one of the most widely used locomotives in railroad service today, contains a section on troubleshooting for "troubles" which are most frequently encountered on the road and which can be quickly remedied thereby eliminating many delays" (EX. 2, p. 300). Testifying exclusively from the list of troubles and instructions indicated in the manual, qualified employee witnesses described the nature of various difficulties listed, what the fireman (helper) does with respect to them and why he is essential in connection therewith. This testimony shows that: (1) modern diesels are subject to difficulties of all sorts on the road; and (2) there are many malfunctions which can be detected only when the engine is moving and under load or power. The engineer alone cannot detect readily, if at all, such malfunctions when the train is stopped. The fireman (helper) does detect and correct these malfunctions or troubles while the engineer remains at the controls and the train continues in motion. (3) The alarm

system is no substitute for the fireman (helper) because (a) many malfunctions have no corresponding alarms, (b) the alarm indicates only that something is wrong, not what is wrong or where it is wrong, and (c) there are false alarms. (See Tr. 13, pp. 2233-2286; Tr. 14, pp. 2615-17, 2627-2636.) This testimony emphasizes the fact that the fireman (helper) is essential because, among other things, the alarm system so heavily relied upon by the carriers does not indicate what the malfunction is or which trailing unit is malfunctioning. Hence it is not just a matter of pushing a button, but first determining where the trouble is developing; second, what is wrong; and, third, what should the fireman (helper) do about it. (See Tr. 13, pp. 2233-37.) These facts were conceded by the carriers' manufacturer's representative. (Tr. 5, p. 732.) The record also shows there are malfunctions or troubles which are not indicated by any alarm whatever, Tr. 13, pp. 2237-38. Further, when an alarm sounds the malfunctioning equipment is not always automatically shut down or put in a safe position. If the fireman (helper) were not aboard to shut down or keep a close watch on the malfunctioning equipment, serious damage to equipment and possible derailment and injury could result. (Tr. 13, pp. 2239-40; Tr. 14, pp. 2627-2631.)

Particular electrical and mechanical troubles were described by employees and they described what the fireman could do by way of preventing and detecting such malfunctions and correcting them en route. This testimony was corroborated by numerous statements of supervisors as shown in EX. 7, at pages 72-93, 100-113, 125-130 and 137-139.

One important engine room function of the fireman (helper) which has apparently been overlooked by the majority of the Board is that of making periodic inspections of the diesel units while the train is in motion. (Tr. 14, pp. 2468, 2498-2500, 2559-63.) The uncontroverted fact is that there are various types of trouble that develop on diesel locomotives which appear on an inspection only while

the train is in motion and the engines under load. This fact and the concomitant requirement that periodic inspections be made while the train is in motion, was clearly and forcefully stated by railway supervisors (see EX. 7, pp. 114-121). The carriers' own September, 1963, survey shows that periodic inspections are made regularly and frequently while the train is in motion in through freight, local freight and yard service. (See CX. 49 and EX. 4 in rebuttal thereto. EX. 5, Affidavit of Jesse L. Shattuck.) This same survey [fol. 212] indicates that firemen (helpers) are indeed busy men. Out of 713 yard and road trips there were 1,184 routine inspections, made both while moving and standing. There were 314 corrections made on 285 routine inspections (CX. 49, pp. 4, 5 and 9). In addition to the routine inspections on which difficulty was encountered, the survey shows that alarms occurred on 96 or 13.5% of 713 trips and that 156 corrective actions were taken in response to these alarms. Employees' Rebuttal Exhibit 4 analyzed and evaluated carriers' Exhibit 49. It demonstrated the biased and unscientific character of the survey. On the basis of the analysis of the underlying reports the exhibit also showed considerable variation from railroad to railroad as to the amount of time spent by the fireman (helper) in relation to routine inspections and correcting malfunctions (EX. Rebuttal 4, Table I). I am certain that a study conducted according to recognized statistical standards would have shown a much higher number of routine inspections and corrections.

Other evidence bearing on the essentiality of the fireman (helper) function with relation to the detection and correction of mechanical and electrical malfunctions en route are the reports of the Bureau of Locomotive Inspection of the Interstate Commerce Commission. The ICC reports show that since the complete dieselization of the railroads, approximately 10% of all locomotives inspected by the Bureau each year are found defective. (See EX. 21, p. 19 and Tr. 14, pp. 2378-79.) Further, since the average number of diesel units which make up a locomotive is now ap-

proximately four, this means that an average of four freight trains out of ten have one defective unit. (Tr. 14, pp. 2379-80.) The record shows a willingness on the part of the carriers to cut corners on safety everywhere. As indicated above, it is not unusual for carriers to put loco-[fol. 213] motives on the ready tracks for service when in fact locomotives are not fit for service. The ICC reports show also that often defects which caused accidents had been reported frequently but had not been repaired. (Tr. 14, pp. 2390-95.)

Related to this problem is the fact that the railroads have cut down drastically the number of shop employees available to maintain the diesel locomotive (EX. 22, pp. 11, 13; Tr. 14, pp. 2408-10). Thus the president of one carrier told this Board that the eastern railroads generally, and other railroads in some parts of the country have deferred maintenance on diesel locomotives and that as a result "locomotive failures are more frequent" (Tr. 19, pp. 3284-88). With regard to this testimony a neutral member of the Board observed "so much of it seems to me to be at variance from what we have heard from other witnesses about the industry as a whole" (Tr. 19, pp. 3284-86). Promptly thereafter carrier counsel attempted to impeach his own witness (Tr. 19, p. 3319). The same witness (Tr. 19, p. 3289) made the statement that maintenance conditions were so bad that it was frequently necessary to send out mechanical people to try to repair locomotives that had broken down. He added "We have had five cases of this that I know of in the past eight days on my own railroad." In response to a question to this witness as to who was then responsible for getting the trains over the road, the witness replied "If the engines are operable, the engine crew is responsible for utilizing their locomotive, of course."

The carriers conceded the fireman (helper) does make routine inspections and does make corrections en route. They have proposed that the engineer take over this function. They suggest two alternatives: (1) that the engineer [fol. 214] ignore the alarm and correct the malfunction

when the train is taken to the next terminal; or (2) that the engineer stop the train and correct the malfunction. The record shows that the first alternative is wholly impracticable. The alarm bell continues to ring until the alarm has been dealt with. The record shows that the bell is noisy, in fact, nerve-racking. The fact is that the engineer does not ordinarily know what malfunction is being designated by the alarm. This can be determined with respect to trailing units only by an inspection of those units. Therefore, under the carrier proposal, the engineer would have to stop for every alarm. The record also shows that ignoring an alarm may result in serious damage to the diesel electric locomotive. But this still does not take into account the many situations in which the alarm may be accompanied by a loss of power, which may make it impossible for the engineer to take it to the next terminal. Finally, there is ignored entirely the electrical and mechanical troubles which can only be detected by observation, but which are not signalled by alarms.

As to both alternative proposals, the record shows that the engineer has a full-time job handling his train in freight and yard service. He must work in all weather conditions, frequently for long periods of time and at all hours of the day and night. He must constantly observe gauges, signals, the right of way for grade crossings, people and obstacles, and must continually bear in mind the terrain in relation to the handling of slack action, the length of the train, the relation of loaded cars to empty cars, timetables, train orders, etc. (See Tr. 5, p. 712; Tr. 14, p. 2460-67, 2483-89, 2509-11, 2521-46, 2549-51, 2560-71; and the employees' [fol. 215] statements that the engineer has a difficult, full-time job handling the train and cannot assume the fireman (helper) functions were fully supported by the statements of the supervisors (EX. 7, pp. 140-166; EX. 28; Tr. 14, pp. 2489-90). No evidence was presented by the carriers as to what the duties of the engineer are and whether his duties would permit him to assume the duties of the fireman (helper). Accordingly, it is difficult for us to comprehend

a finding that the engineer can assume the further duties and responsibilities of the fireman (helper) safely or efficiently.

The carriers' alternative proposal that the train can be stopped without endangering safety and without seriously undermining the adequacy of transportation service is completely refuted by the record. The stopping and starting of trains involves considerable delay even if the engineer alone could locate the trouble in short order. The record shows also the stopping of one train for this purpose may often tie up other trains. (See Tr. 5, p. 730; 6, pp. 931-6; 13, pp. 2259-61, 2279; 14, pp. 2468-71, 2618-25; EX. 36; EX. 39, pp. 13-15.) The safety of passengers on passenger trains is inextricably bound with the safe and efficient movement of freight trains—they run on the same tracks. (See Rebuttal EX. 8.) Moreover, the undisputed fact is that the stopping and starting of an average freight train today costs more than the daily wage of the fireman (helper) (Ex. 18, Tr. 6, p. 934). Since the carriers state they have nothing to sell but "on-time" service (Tr. 6, pp. 886-7), we are more than puzzled by an award which gives apparent weight to the "stop the train" argument. Even carriers' counsel repudiated this argument. True, he waited to do [fol. 216] this until the crew consist issue was presented. Then in supporting a free hand for the carriers in determining the size of crews, he stated the carriers' awareness that delays increase operating expense, such as overtime payments, that undermanning may contribute to delay and unsafe operations, and that "the maintenance of safe and fast service is essential to economic survival" of the railroad industry. (Tr. 15, pp. 2681-2683.)

Although there is little dispute of the lookout function of the fireman (helper), I should say something about the contention which is frequently made that in road service the fireman (helper) is unnecessary because in any event the headend brakeman is available to perform the fireman's duties.

There can be no question that a lookout must be maintained on the left side of the train. The lookout function

on the left, always important, becomes particularly critical when the train is rounding a curve toward the left because then the engineer has no view whatever of the track ahead and must rely completely upon the fireman. It is scarcely necessary to state the reasons why it is necessary to maintain a lookout at all times. It is common knowledge and the record shows that pedestrians and motorists tend to be careless of trains. Children wander on the tracks. The track ahead must be constantly observed for proper alignment of switches, and obstructions (Tr. pp. 2456-8, 2526-8, 2541, 2559-60; EX. 1, pp. 2-4, 6-7, EX. 16, 7-8).

The headend brakeman, while frequently stationed in the cab of one of the units of the locomotive, is not and never has been trained to work on the locomotive and therefore is not qualified by training and experience to perform the mechanical functions of the fireman. Further, while the [fol. 217] train is enroute, the task of the head-end brakeman is to maintain a lookout to the rear for such things as hot journal boxes, projecting lading and similar hazards. (Tr. 5, p. 755, Tr. 25, pp. 4097, 4113-14.) Under the rules of many carriers he does not ride in the cab of the lead unit with the fireman and engineer, but in the cab of the last unit in the locomotive consist so that he will be closer to the train and thus better able to observe it. When he is in the lead cab, and the fireman must leave the left side to perform mechanical work, the head-end brakeman is the only person left to perform lookout on the left side.

Nor is this all. A road freight train does not ordinarily proceed from its point of departure to its terminal on a nonstop basis. Generally the train stops at numerous points enroute to set out or pick up cars at sidings and industries located along the way. At points of meeting other lines, cars will be set out to be picked up by the other carrier, or cars will be picked up which have been left there by the other carrier. At such points it is necessary for the head-end brakeman to be on the ground in order to couple and uncouple cars, couple and uncouple airhoses, throw switches, give signals to the engine crew, and otherwise to

perform his specific function. During this period, while it is necessary for the engine to move both forward and reverse to switch cars, no one but the fireman is on the locomotive to maintain a lookout on the left side. (EX. 4, Rebuttal, Table 31.) And, I wish to stress that it is precisely during the course of such forward and reverse movements that it becomes most essential to maintain a lookout on both sides of the train. Frequently points at which [fol. 218] stops are made for switching are points of congestion. The record contains abundant testimony to the effect that at such points it is common to find public crossings and congestion. The train itself, since it is proceeding backward and forward, is engaging in hazardous movements. If the setout or pickup is made at a factory located on the right of way, the special problem of factory employees is present. Often such movements must be made in congested parts of a city. (Tr. 14, pp. 2463, 2561-65.)

Another important duty of the fireman is to provide relief for the engineer. An engineer working over long periods of time, at night, in rain, sleet, fog or other adverse conditions, becomes fatigued. (Tr. 14, p. 2541.) Consequently, it has been the custom in the industry for generations for the fireman and the engineer to trade places from time to time. This custom has another important function—it gives the fireman valuable experience in train handling so that when he becomes an engineer himself in the course of time he will be adequately trained to perform this important task. Needless to say, the head-end brakeman and other members of the train crew are not qualified and are not allowed to perform this task. In addition, there are situations where an emergency stop is made when the fireman is the only man available to proceed ahead of the train to flag down other trains which may be approaching on the same track. Further, there are frequent occasions when it is necessary for the fireman to flag public crossings. These are but a few of the other duties of the fireman.

What I have said regarding road service applies generally to yard service. There are, however, some special fea-

[fol. 219] tures of yard work which demand comment. In yard work, only the engineer and the fireman are present in the cab of the locomotive. Usually the conductor and the two switchmen must be on the ground to perform their functions properly. Thus only the fireman is on the locomotive to maintain a watch on the left side of the train. Only the fireman can relay signals to the engineer when it is necessary, as it frequently is, for the ground crew to work on the left side of the train. Again there can be no question as to the needs for maintaining such a lookout. Yard service work poses hazards of its own. Curves are common; obstructions frequently are numerous due to bridge abutments, buildings built close to the tracks, debris along the right-of-way and other hazards. The fireman must maintain a watch not only for the members of his own crew but also for members of other crews who may be working nearby. It is common, moreover, for yard crews to work not only in yards operated by the railroads themselves but also to make deliveries and pickups at industries nearby. This entails going upon the properties where special watch must be maintained for employees and members of the general public. Photographs introduced in evidence demonstrate vividly the hazards of such movements, and, of course, in such movements, since the head-end brakeman is on the ground, no one but the fireman is available to perform the important duty of lefthand lookout.

Nor does the foregoing end the catalogue of important duties of the fireman in yard service. Here, too, the fireman has a mechanical function to perform. He is required, on many carriers, to make periodic inspection of the locomotive. Contrary to carrier testimony, when a breakdown does occur it is frequently necessary for the fireman to [fol. 220] handle matters by himself as assistance from shop crews may be far away and slow in coming.

The other duties of the fireman (helper) described above in connection with road service apply with equal force to yard service.

CONCLUSION

I have set forth in this dissent the manner in which the Board exceeded its statutory jurisdiction and have discussed such portions of the record bearing on the essentiality of the fireman (helper) as time and space permitted. I recognize that the report of Emergency Board No. 154 represented a step upward from the report of the Presidential Railroad Commission, and the award of the Board represents a further step upward from Emergency Board No. 154. The Board expresses its recognition of the need for firemen (helpers) in the veto given local chairmen. But I must record substantial disappointment in the award. The consequence of the failure of the Board to comply with the statutory mandate and to give effect to the record made before it is to jeopardize the job rights of thousands of employees represented by the organization, and to unnecessarily expose the public and all railway operating employees to increased hazards and reduced efficiency of railroad operations.

/s/ H. E. GILBERT
H. E. Gilbert

November 26, 1963

[fol. 221]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 5

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

AFFIDAVIT OF BEN W. SMITH

I, BEN W. SMITH, having been first duly sworn, on my oath depose and state:

I am Director of Labor Relations for the Missouri Pacific Railroad Company and have occupied such position since October 1, 1957. I was appointed by the Missouri Pacific

Railroad Company and by The Texas and Pacific Railway Company as the carrier member of the Special Boards of Adjustment established pursuant to Article III, Part B of the Award of Arbitration Board No. 282, dated November 26, 1963, said Award being filed in the United States District Court, District of Columbia, pursuant to Public Law 88-108, approved August 28, 1963. There were two such Boards established on Missouri Pacific Railroad Company, one for the Northern, Central and Southern Districts and a second one for the Gulf District. A third board was established for The Texas and Pacific Railway Company, a subsidiary of the Missouri Pacific.

Mr. Dudley Whiting of Detroit was appointed the neutral member of all three Boards of Adjustment. The Boards handed down their decisions on May 6, which decisions were signed by Mr. Whiting and myself. They were not signed by the employee member because the employees' organization had refused to participate.

[fol. 222] The attached are true and correct copies of the three decisions rendered by the three above-mentioned Special Boards of Adjustment on May 6, 1964.

/s/ BEN W. SMITH
BEN W. SMITH

SUBSCRIBED AND SWORN to before me this 12th day of October, 1964.

/s/ R. C. MASON
Notary Public

My Commission Expires Sept. 28, 1966

(SEAL)

[fol. 223]

SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED UNDER ARBITRATION BOARD
NO. 282

between the

MISSOURI PACIFIC RAILROAD COMPANY
(Northern, Central and Southern Districts)

and

BROTHERHOOD OF RAILROAD TRAINMEN

BACKGROUND:

The award of Arbitration Board No. 282 provided that changes in the scope or application of rules, which require a stipulated number of trainmen in road service or brakemen in yard service, could only be accomplished by agreement or in accordance with procedures provided therein. This Carrier gave notice thereunder on January 25, 1964 to the Organization of proposed changes in the number of brakemen or helpers to be used in several classes of road and yard service.

The Organization refused to meet or negotiate thereon because it considered such notice to be premature. Pursuant to the provisions of such award, this Board was established with the Organization Member and the Neutral Member having been appointed by the National Mediation Board.

When this Board convened on March 31, 1964 the Organization requested an indefinite recess and delay in its proceedings. That request was denied by a decision dated April 1, 1964. The neutral member then urged the parties to engage in the good faith bargaining, upon this crew consist issue, contemplated by the award of Board No. 282. The representatives of the Organization declined to do so and refused to participate further in the proceedings of this Board. Accordingly the following findings and award are based upon the evidence submitted by the Carrier.

FINDINGS:**1. Road Service**

The award of Board No. 282 permits notice of proposals for change in the stipulated number of trainmen required to be used in any class of road service in the following categories:

[fol. 224]

- (a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and
- (b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen.

The Carrier's notice of January 25, 1964 proposed the following changes in the number of brakemen to be used in road service:

"All main line local freight trains now requiring three brakemen under the provisions of Article 38 of the Basic Schedule will be operated with two brakemen.

All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with one brakeman, except service on the Great Bend Branch shall not require the use of a brakeman.

All traveling switch engine service will be protected by one brakeman.

The following scheduled passenger trains and all extra passenger trains will not require the use of a brakeman-flagman:

Nos. 14 and 15,
 Nos. 11 and 12 between Kansas City and Pueblo,
 Nos. 1 and 2,
 Nos. 34 and 35,
 Nos. 31 and 32,
 Nos. 37 and 38, and
 Nos. 16 and 17 between Kansas City and Omaha."

Part III C (1) of the award is as follows:

"C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions."

Paragraph C(2) sets forth the general considerations, C(3) the particular considerations in passenger road service, C(4) the particular considerations in freight service, and C(5) the particular considerations in yard service. It does not appear necessary to restate them here. Basically they all relate to safety of operation or workload.

[fol. 225] (a) Main Line Local Freight Service.

Article 38 of the Trainmen's Schedule provides that "on all main line local freight, 'Dutch' local, and mixed trains, the crew shall consist of a conductor and three brakemen".

It appears that when this rule was first written in 1890 there was a large amount of LCL freight handled in way freight or peddler cars, and that it was the duty of the train crew to load and unload such freight at various stations along the line. Today no way freight or peddler cars are used and the work of loading and unloading them has been eliminated.

At that time, it also appears, many small industries used rail service, whereas now many of them use truck service, which has substantially reduced the switching required by local freight crews.

Other changes over the years are the installation of automatic block signals, CTC, automatic crossing signals and radio communication with and between trains. Operating officials of this Carrier consider flag protection of trains outmoded, in view of the improved systems of control and communication, and propose to change the operating rules to eliminate any requirement for flagging. When that work is eliminated, one less brakeman is necessary to accomplish the work and man all positions for work when the train is stopped.

Through freight trains operate over most of the territory served by these locals. They have a crew consisting of a conductor and two brakemen and perform some switching, set-out and pick-up of cars. This is cogent evidence that the locals can be operated safely with the crew consist proposed by the Carrier.

The presence or absence of a fireman in the engine service crew would not alter these findings, because it appears that on trains manned with a conductor and two brakemen, one of the brakemen rides in the locomotive when running over the road.

[fol. 226] Under the circumstances shown, the proposal of the Carrier, with respect to main line local freight service crew requirements, is justified by the guidelines set forth in the award of Board No. 282.

(b). Branch Line Service.

Article 38, referred to in part 1 (a) above, also provides that "on branch runs, where the service is light, the crews shall consist of a conductor and two brakemen, excepting that on branches where the trains are heavy enough to require it, three brakemen shall be employed at the discretion of the Superintendent".

This is a long standing recognition that train crews on branch line service can appropriately consist of one less brakeman than on main line service. It appears that generally there is no other service on the branch line, switching is light and uncomplicated, and the number of cars handled is less than on main lines. Changing the stipulation regarding crew consist would not alter the discretion of the Superintendent to assign more brakemen where the trains are heavy enough to require it.

All of the changes in work load and most of those concerning changes in control and communication equipment discussed in part 1 (a) hereof are applicable here. There is obviously no necessity for flag protection when the train is the only one on the branch and, if the fireman is eliminated from the engine crew, safe operation can be assured

by assigning the brakeman to ride in the locomotive while running over the road.

Under these circumstances the Carrier's proposal, to reduce the crew consist to one brakeman and a conductor, is justified by the guidelines in the award of Board No. 282.

The Carrier also proposed to operate the Great Bend Branch local without a brakeman. It shows that this branch is only ten miles long, usually only four of five cars are handled, and, while it has agreed to a six day assignment, [fol. 227] the train only operates two or three days per week, the crew averaging less than two hours on duty when it is operated.

Assuming, as we must, that this train will be operated without a fireman, it does not appear that this portion of the Carrier's proposal is justified under the guidelines in the award of Board No. 282.

(c). Traveling Switch Engine Service.

It has been the practice to use a train crew consisting of a conductor and two brakemen in this service. While this service is similar to yard service in some respects, operating within a limited area primarily to serve industries where no yard is maintained, it is still road service. The award of Board No. 282 permits a party to give notice of a proposed change in crew consist only in the branch line category, where the existing rule or practice requires the use of two trainmen in road service.

It appears that some of the traveling switch engine assignments are branch line service but others are main line road service. For the latter the carrier's notice of proposed change is ineffective. For those which are branch line service, the propriety of the notice is governed by the findings in part 1 (b) hereof.

(d). Passenger Service.

On the passenger trains listed in the Carrier's notice of January 25, 1964, a brakeman-flagman has been assigned. It appears that his sole duty has been to provide flag protection when the train is stopped and that he has not

handled mail or baggage, assisted passengers, nor participated in the handling of passenger transportation. These latter duties have always been performed by train porters.

When the Carrier changes its operating rules to eliminate flagging, this brakeman-flagman will not be needed. The award of Board No. 282 provides for the continued presence of a fireman on passenger trains.

[fol. 228] Under these circumstances the Carrier's proposal to eliminate the brakeman-flagman position on the passenger trains specified therein is justified by the guidelines set forth in the award by Board No. 282.

2. Yard Service.

The award of Board No. 282 permits notice of any proposed change in the stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service.

Article 8 of the Yardmen's Schedule provides that "a crew shall consist of not less than one foreman and two helpers".

The Carrier's notice of January 25, 1964 proposed the following changes in such stipulated number of helpers to be used in yard service:

"There shall be only one helper employed on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helpers will be employed on the specific yard assignments listed below:

Assignments Nos. 116, 216 and 316, known as 'hill jobs,' and

Assignment No. 302, known as 'transfer,'
St. Louis Terminal, 23rd Street Seniority District.

Assignment No. 205, known as 'transfer,' and
Assignment No. 208, known as 'extra bum,'
St. Louis Terminal, Lesperance Street Seniority
District.

Assignment No. 5, known as 'St. Louis transfer,'
 Assignments Nos. 1 and 25, known as 'A&S transfers,'

Assignment No. 11, known as 'utility,' and
 Assignment No. 35, known as 'Madison transfer,'
 St. Louis Terminal, Dupo Seniority District.

All yard assignments—Falls City Yard, and
 All yard assignments—Leavenworth Yard,
 Omaha Division, Omaha Seniority District.

All yard assignments—Fort Scott Yard,
 Central Division, Wichita, McPherson, Hardtner,
 Hutchinson Subdivisions Seniority District.

All yard assignments—Paragould, Arkansas,
 Louisiana Division, Memphis Seniority District."

[fol. 229] It appears that since 1910 when that consist rule was adopted there have been many changes in equipment affecting the work of yardmen. Cars are now equipped with hand power brakes, which make the setting of brakes much easier and quicker than the old stem-winding hand brake, and which necessitate setting brakes on fewer cars because the holding power is much greater.

In recent years automated electronic classification yards have been constructed in Kansas City and Little Rock. Utilization of these yards has reduced the necessity for classification work in other yards as trains now arrive with cars grouped for the various connections and industrial areas. Thus lead switching has been greatly reduced and yard work has become mostly pulls and shoves.

Engines are equipped with two-way radio, portable radio sets are available for ground crews to communicate with the engineer, and larger yards have been equipped with tele-talk equipment. Street and highway crossings within switching limits are generally protected by automatic signals.

It appears that these cumulative changes have reduced the effort required of yardmen and enhanced the safety of yard operations. Even if we assume that firemen will be

eliminated from yard engines, it is apparent that the proposal of the Carrier, to reduce the stipulated number of helpers used in all classes of yard service to one, is justified by the guidelines set forth in the award of Board No. 282.

The propriety of the remainder of the Carrier's proposal to operate specific yard assignments without a helper is not so obvious from the evidence adduced and must be denied under those guidelines, except in the following situations.

It appears that at Leavenworth, Kansas, one yard engine is assigned five days per week to handle setouts and pickups by two trains and interchange with two other carriers. The work is so meager that only two or three cars are handled at a time and the time of the crew is largely waiting rather [fol. 230] than working time. It could, apparently, be handled easily by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Falls City, Nebraska. It is not operated every day and, when operated, the switching required consumes no more than two hours. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Fort Scott, Kansas. It is operated only on those days when service is needed and rarely exceeds one hour of work on the days it is used. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Paragould, Arkansas. It is operated only three days per week and on those days rarely exceeds two hours of work. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

3. General Findings

It should be noted that, under Part III D of the Award of Board No. 282, no employee who was in train or yard service on January 25, 1964 will be separated from the service,

unless and until retired, discharged for cause, or otherwise removed from the service of the Carrier by natural attrition. In their opinion, the neutral members of that board said:

"The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination. The sharpest and most stubborn [fol. 231] disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared 'blankable' within a given length of time. It is important to realize, however, that *declaring a job 'blankable' under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant*. The Board's award makes the actual elimination of jobs subject, in most cases, to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination that a job is 'blankable' will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it."

It should also be noted that the proposed changes in the stipulated number of brakemen or helpers required in each class of service are, like the prior rules and practices, stipulations of minimum crew consist. If on particular days or assignments more are needed to accomplish the work efficiently, the Carrier is free to assign a larger crew.

AWARD:

1. (a). All main line local freight trains will be operated with a minimum of two brakemen.
 - (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c). The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
 - (d). The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.
2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helper shall be required on the following yard assignments:

Leavenworth Yard

Falls City Yard.

[fol. 232] Fort Scott Yard

Paragould Yard.

**SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED UNDER
ARBITRATION BOARD NO. 282**

/s/ DUDLEY E. WHITING

Dudley E. Whiting, Neutral Member

Employee Member

/s/ B. W. SMITH
Carrier Member

St. Louis, Missouri

May 6, 1964

File: 269 ARB AW-BRT

[fol. 233]

**SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED UNDER
ARBITRATION BOARD NO. 282**

between the

**MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)**

and

BROTHERHOOD OF RAILROAD TRAINMEN

BACKGROUND:

The award of Arbitration Board No. 282 provided that changes in the scope or application of rules, which require a stipulated number of trainmen in road service or brakemen in yard service, could only be accomplished by agreement or in accordance with procedures provided therein. This Carrier gave notice thereunder on January 25, 1964, to the Organization of proposed changes in the number of brakemen or helpers to be used in several classes of road and yard service.

The Organization refused to meet or negotiate thereon because it considered such notice to be premature. Pursuant to the provisions of such award, this Board was established with the Organization Member and the Neutral Member having been appointed by the National Mediation Board.

When this Board convened on April 15, 1964, in Palestine, Texas, the representatives of the Organization stated that their position was the same as had been stated before the Special Board of Adjustment between the Missouri Pacific Railroad Company (Northern, Central and Southern Districts) and the Brotherhood of Railroad Trainmen on March 31, 1964, and that they would not participate further in the proceedings of this Board. Accordingly, the following findings and award are based upon the evidence submitted by the Carrier.

[fol. 234] *FINDINGS:*

1. Road Service

The award of Board No. 282 permits notice of proposals for change in the stipulated number of trainmen required to be used in any class of road service in the following categories:

- (a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and
- (b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen.

The Carrier's notice of January 25, 1964, proposed the following changes in the number of brakemen to be used in road service:

"All main line local freight trains now requiring three brakemen under agreement provisions will be operated with two brakemen.

All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with one brakeman.

All traveling switch engine service will be protected by one brakeman.

The following scheduled passenger trains and all extra passenger trains will not require the use of a brakeman-flagman:

Nos. 1 and 2 between Palestine and Longview."

Part III C (1) of the award is as follows:

"C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, par-

ticular considerations, although none of these factors alone shall be controlling of the board's decisions."

Paragraph C(2) sets forth the general considerations, C(3) the particular considerations in passenger road service, C(4) the particular considerations in freight service, and C(5) the particular considerations in yard service. It does [fol. 235] not appear necessary to restate them here. Basically they all relate to safety of operation or workload.

(a) Main Line Local Freight Service.

It appears that on a portion of the property rules or agreements require the use of a crew consisting of a conductor and three brakemen on main line local freight trains, but on other portions of the property the practice has been to use a crew consisting of a conductor and two brakemen on such trains.

It also appears that when these rules were first written there was a large amount of LCL freight handled in way freight or peddler cars, and that it was the duty of the train crew to load and unload such freight at various stations along the line. Today no way freight or peddler cars are used and the work of loading and unloading them has been eliminated. It also appears that at such time some of the cars were not equipped with air brakes and originally the rule was based upon a percentage of the cars in a train equipped with air brakes.

At that time, it also appears, many small industries used rail service, whereas now many of them use truck service, which has substantially reduced the switching required by local freight crews.

Other changes over the years are the installation of automatic block signals, CTC, automatic crossing signals and radio communication with and between trains. Operating officials of this Carrier consider flag protection of trains outmoded, in view of the improved systems of control and communication, and propose to change the operating rules

to eliminate any requirement for flagging. When that work is eliminated, one less brakeman is necessary to accomplish the work and man all positions for work when the train is stopped.

[fol. 236] Through freight trains operate over most of the territory served by these locals. They have a crew consisting of a conductor and two brakemen and perform some switching, set-out and pick-up of cars, and, as noted above, on some portions of this property locals are operated with two brakemen. This is cogent evidence that the locals can be operated safely with the crew consist proposed by the Carrier.

The presence or absence of a fireman in the engine service crew would not alter these findings, because it appears that on trains manned with a conductor and two brakemen, one of the brakemen rides in the locomotive when running over the road.

Under the circumstances shown, the proposal of the Carrier, with respect to main line local freight service crew requirements, is justified by the guidelines set forth in the award of Board No. 282.

(b). Branch Line Service.

It appears that on a portion of the property a rule requires the use of a crew consisting of a conductor and two brakemen on branch line trains, and on the remainder of the property it has been the practice to use a crew of that same consist on such branch line trains.

This is a long standing recognition that train crews on branch line service can appropriately consist of one less brakeman than on main line service. It appears that generally there is no other service on the branch line, switching is light and uncomplicated, and the number of cars handled is less than on main lines. Changing the stipulation regarding crew consist would not alter the discretion of the Superintendent to assign more brakemen where the trains are heavy enough to require it.

[fol. 237] All of the changes in work load and most of those concerning changes in control and communication

equipment discussed in part 1 (a) hereof are applicable here. There is obviously no necessity for flag protection when the train is the only one on the branch and, if the fireman is eliminated from the engine crew, safe operation can be assured by assigning the brakeman to ride in the locomotive while running over the road.

Under these circumstances, the Carrier's proposal, to reduce the crew consist to one brakeman and a conductor, is justified by the guidelines in the award of Board No. 282.

(c). Traveling Switch Engine Service.

It has been the practice to use a train crew consisting of a conductor and two brakemen in this service. While this service is similar to yard service in some respects, operating within a limited area primarily to serve industries where no yard is maintained, it is still road service. The award of Board No. 282 permits a party to give notice of a proposed change in crew consist only in the branch line category, where the existing rule or practice requires the use of two trainmen in road service.

It appears that some of the traveling switch engine assignments are branch line service but others are main line road service. For the latter the Carrier's notice of proposed change is ineffective. For those which are branch line service, the propriety of the notice is governed by the findings in part 1(b) hereof.

(d). Passenger Service.

On the passenger trains listed in the Carrier's notice of January 25, 1964, a brakeman-flagman has been assigned. [fol. 238] It appears that his sole duty has been to provide flag protection when the train is stopped and that he has not handled mail or baggage, assisted passengers, nor participated in the handling of passenger transportation. These latter duties have always been performed by train porters.

When the Carrier changes its operating rules to eliminate flagging, this brakeman-flagman will not be needed. The

award of Board No. 282 provides for the continued presence of a fireman on passenger trains.

Under these circumstances, the Carrier's proposal to eliminate the brakeman-flagman position on the passenger trains specified therein is justified by the guidelines set forth in the award by Board No. 282.

2. Yard Service.

The award of Board No. 282 permits notice of any proposed change in the stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service.

It appears that the Yardmen's Schedule permits the use of specified numbers of assignments at specific locations with crews consisting of a foreman and two helpers, but the remainder of the assignments at those locations require the use of a crew consist of a foreman and three helpers.

The Carrier's notice of January 25, 1964, proposed the following change in such stipulated number of helpers to be used in yard service:

"There shall be only one helper employed on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service."

It appears that since that consist rule was adopted there have been many changes in equipment affecting the work of yardmen. Cars are now equipped with hand power brakes, which make the setting of brakes much easier and quicker [fol. 239] than the old stem-winding hand brake, and which necessitate setting brakes on fewer cars because the holding power is much greater.

In recent years automated electronic classification yards have been constructed in Kansas City and Little Rock. Utilization of these yards has reduced the necessity for classification work in other yards as trains now arrive with cars grouped for the various connections and industrial areas. Thus lead switching has been greatly reduced and yard work has become mostly pulls and shoves.

Engines are equipped with two-way radio, portable radio sets are available for ground crews to communicate with the engineer, and larger yards have been equipped with tele-talk equipment. Street and highway crossings within switching limits are generally protected by automatic signals.

It appears that these cumulative changes have reduced the effort required of yardmen and enhanced the safety of yard operations. Even if we assume that firemen will be eliminated from yard engines, it is apparent that the proposal of the Carrier, to reduce the stipulated number of helpers used in all classes of yard service to one, is justified by the guidelines set forth in the award of Board No. 282.

3. General Findings

It should be noted that, under Part III D of the Award of Board No. 282, no employee who was in train or yard service on January 25, 1964, will be separated from the service, unless and until retired, discharged for cause, or otherwise removed from the service of the Carrier by natural attrition. In their opinion, the neutral members of that board said:

[fol. 240] "The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination. The sharpest and most stubborn disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared 'blankable' within a given length of time. It is important to realize, how-

ever, that declaring a job 'blankable' under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant. The Board's award makes the actual elimination of jobs subject, in most cases, to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination that a job is 'blankable' will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it."

It should also be noted that the proposed changes in the stipulated number of brakemen or helpers required in each class of service are, like the prior rules and practices, stipulations of minimum crew consist. If on particular days or assignments more are needed to accomplish the work efficiently, the Carrier is free to assign a larger crew.

AWARD:

1. (a). All main line local freight trains will be operated with a minimum of two brakemen.
- (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.

[fol. 241]

- (c). The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
- (d). The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.

2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service.

**SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED UNDER ARBITRATION BOARD
NO. 282**

/s/ DUDLEY E. WHITING
Dudley E. Whiting, Neutral Member

Employee Member

/s/ B. W. SMITH
Carrier Member

St. Louis, Missouri

May 6, 1964

File: 269 ARB AW-BRT

[fol. 242]

**SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED UNDER ARBITRATION BOARD
NO. 282**

between

**THE TEXAS AND PACIFIC RAILWAY COMPANY
AND SUBSIDIARY LINES**

and

BROTHERHOOD OF RAILROAD TRAINMEN

BACKGROUND:

The award of Arbitration Board No. 282 provided that changes in the scope or application of rules, which require a stipulated number of trainmen in road service or brakemen in yard service, could only be accomplished by agreement or in accordance with procedures provided therein. This Carrier gave notice thereunder on January 25, 1964 to the Organization of proposed changes in the number of brakemen or helpers to be used in several classes of road and yard service.

The Organization refused to meet or negotiate thereon because it considered such notice to be premature. Pursuant to the provisions of such award, this Board was established with the Organization Member and the Neutral Member having been appointed by the National Mediation Board.

This Board was convened on April 15, 1964 at Palestine, Texas, and representatives of the Organization stated that their position was the same as that stated to a Special Board of Adjustment between the Missouri Pacific Railroad Company (Northern, Central and Southern Districts) and the Brotherhood of Railroad Trainmen on March 31, 1964 and that, accordingly, they would not participate further in the proceedings of this Board. Accordingly, the following findings and award are based upon the evidence submitted by the Carrier.

FINDINGS:

1. Road Service

The award of Board No. 282 permits notice of proposals [fol. 243] for change in the stipulated number of trainmen required to be used in any class of road service in the following categories:

- (a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and
- (b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen.

The Carrier's notice of January 25, 1964 proposed the following changes in the number of brakemen to be used in road service:

"All main line freight trains now requiring three brakemen will be operated with two brakemen.

All classes of road service, including all miscellaneous and unclassified service, on branch lines will be op-

erated with one brakeman, except that service on the A&S, WMW&NW, Texarkana, D&PS, Pleasant Hill, Thibodaux, Avoyelles and Churchpoint Sub Divisions shall not require the use of a brakeman.

All dodgers will be operated with one brakeman."

Part III C (1) of the award is as follows:

"C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions."

Paragraph C(2) sets forth the general considerations, C(3) the particular considerations in passenger road service, C(4) the particular considerations in freight service, and C(5) the particular considerations in yard service. It does not appear necessary to restate them here. Basically they all relate to safety of operation or workload.

(a) Main Line Local Freight Service.

Article 5 of the Trainmen's Schedule requires the use [fol. 244] of a crew consisting of a conductor and three brakemen on main line locals on a portion of the railroad, but on other portions similar trains are operated with a crew consisting of a conductor and two brakemen.

It appears that when this rule was first written there was a large amount of LCL freight handled in way freight or peddler cars, and that it was the duty of the train crew to load and unload such freight at various stations along the line. Today no way freight or peddler cars are used and the work of loading and unloading them has been eliminated.

At that time, it also appears, many small industries used rail service, whereas now many of them use truck service, which has substantially reduced the switching required by local freight crews.

Other changes over the years are the installation of automatic block signals, CTC, automatic crossing signals and

radio communication with and between trains. Operating officials of this Carrier consider flag protection of trains outmoded, in view of the improved systems of control and communication, and propose to change the operating rules to eliminate any requirement for flagging. When that work is eliminated, one less brakeman is necessary to accomplish the work and man all positions for work when the train is stopped.

Through freight trains operate over most of the territory served by these locals. They have a crew consisting of a conductor and two brakemen and perform some switching, set-out and pick-up of cars, and as noted above local freight trains are operated with a crew consisting of a conductor and two brakemen on some portions of this Carrier's property. This is cogent evidence that the locals can be operated safely with the crew consist proposed by the Carrier.

[fol. 245] The presence or absence of a fireman in the engine service crew would not alter these findings, because it appears that on trains manned with a conductor and two brakemen, one of the brakemen rides in the locomotive when running over the road.

Under the circumstances shown, the proposal of the Carrier, with respect to main line local freight service crew requirements, is justified by the guidelines set forth in the award of Board No. 282.

(b). Branch Line Service.

It appears that it has been the practice to operate trains on branch lines with a crew consisting of a conductor and two brakemen.

This is a long standing recognition that train crews on branch line service can appropriately consist of one less brakeman than on main line service. It appears that generally there is no other service on the branch line, switching is light and uncomplicated, and the number of cars handled is less than on main lines. Changing the stipulation regarding crew consist would not alter the discretion of the Superintendent to assign more brakemen where the trains are heavy enough to require it.

All of the changes in work load and most of those concerning changes in control and communication equipment discussed in part 1 (a) hereof are applicable here. There is obviously no necessity for flag protection when the train is the only one on the branch and, if the fireman is eliminated from the engine crew, safe operation can be assured by assigning the brakeman to ride in the locomotive while running over the road.

Under these circumstances the Carrier's proposal, to reduce the crew consist to one brakeman and a conductor, is justified by the guidelines in the award of Board No. 282.

[fol. 246] (c). Dodger Service.

It has been the practice to use a train crew consisting of a conductor and two brakemen in this service except where the rule requires three brakemen. While this service is similar to yard service in some respects, operating within a limited area primarily to serve industries where no yard is maintained, it is still road service. The award of Board No. 282 permits a party to give notice of a proposed change in crew consist only in the branch line category, where the existing rule or practice requires the use of two trainmen in road service and where existing rule or practice on main line requires more or less than two brakemen.

It appears that some of the dodger assignments are branch line service but others are main line road service. For the latter the carrier's notice of proposed change is ineffective except where three brakemen are required. For those which are branch line service, the propriety of the notice is governed by the findings in part 1 (b) hereof and for those on main line requiring three brakemen in part 1 (a) hereof.

2. Yard Service.

The award of Board No. 282 permits notice of any proposed change in the stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service.

Article 1 (d), (e) and (f) of the Yardmen's Agreement reads as follows:

"(d) Yard crews shall consist of not less than one foreman and two helpers.

(e) In yards where a foreman and three helpers are now employed, there will be no reduction in the number of men employed unless a change in conditions justifies it.

(f) Yard crews will not be required to work short handed when men are available, nor will they be required to work with inexperienced men when experienced men can be obtained."

The Carrier's notice of January 25, 1964 proposed the [fol. 247] following changes in such stipulated number of helpers to be used in yard service:

"There shall be only one helper employed on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helpers will be employed on the yard assignments listed below:

All yard engines at Abilene.

All Fort Worth Belt yard engines.

Fort Worth-Lancaster Yard Assignment No. 6, commonly referred to as 'Hodge Engine'."

It appears that since that consist rule was adopted there have been many changes in equipment affecting the work of yardmen. Cars are now equipped with hand power brakes, which make the setting of brakes much easier and quicker than the old stem-winding hand brake, and which necessitate setting brakes on fewer cars because the holding power is much greater.

In recent years automated electronic classifications yards have been constructed in Kansas City and Little Rock on the Missouri Pacific Railroad, parent company of this railroad. Because of considerable through service and the

closely allied operations, utilization of these yards has reduced the necessity for classification work in the yards of this railroad as trains now arrive with cars grouped for the various connections. This Carrier has maintained a large hump classification yard at Fort Worth which reduces the necessity for classification work in other yards. Thus lead switching has been greatly reduced and yard work has become mostly pulls and shoves.

Engines are equipped with two-way radio, portable radio sets are available for ground crews to communicate with the engine, and larger yards have been equipped with tele-talk equipment. Street and highway crossings within switching limits are generally protected by automatic signals.

It appears that these cumulative changes have reduced the effort required of yardmen and enhanced the safety of yard operations. Even if we assume that firemen will [fol. 248] be eliminated from yard engines, it is apparent that the proposal of the Carrier, to reduce the stipulated number of helpers used in all classes of yard service to one, is justified by the guidelines set forth in the award of Board No. 282.

The propriety of the remainder of the Carrier's proposal to operate specific yard assignments without a helper is not so obvious from the evidence adduced and must be denied under those guidelines.

3. General Findings

It should be noted that, under Part III D of the Award of Board No. 282, no employee who was in train or yard service on January 25, 1964 will be separated from the service, unless and until retired, discharged for cause, or otherwise removed from the service of the Carrier by natural attrition. In their opinion, the neutral members of that board said:

"The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally

important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination. The sharpest and most stubborn disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared 'blankable' within a given length of time. It is important to realize, however, that *declaring a job 'blankable' under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant.* The Board's award makes the actual elimination of jobs subject, in most cases, to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination [fol. 249] that a job is 'blankable' will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it."

It should also be noted that the proposed changes in the stipulated number of brakemen or helpers required in each class of service are, like the prior rules and practices, stipulations of minimum crew consist. If on particular days or assignments more are needed to accomplish the work efficiently, the Carrier is free to assign a larger crew.

AWARD:

1. (a). All main line local freight trains and dodgers will be operated with a minimum of two brakemen.

- (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c). The Carrier's proposal respecting dodger service is denied, except as such service is encompassed by parts (a) and (b) above.
2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service.

**SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED UNDER ARBITRATION BOARD
NO. 282**

/s/ DUDLEY E. WHITING
Dudley E. Whiting, Neutral Member

.....
Employee Member

/s/ B. W. SMITH
Carrier Member

St. Louis, Missouri
May 6, 1964

File: 269 ARB AW-BRT
cc: T-32050

[fol. 250]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 6

STATE OF ARKANSAS)
) ss.
 COUNTY OF PULASKI)

AFFIDAVIT OF JENNIE FURR

Jennie Furr, first having been duly sworn, states on oath as follows:

I am Secretary of the Arkansas Commerce Commission and as such am the custodian of the official files and records of said Commission. The Commission is the public agency of the State of Arkansas charged by law with the duty of regulating public utilities engaged in transportation, including railroads, and in the regular course of its business and the discharge of the duties imposed upon it by law the Commission maintains records concerning all railroad operations in Arkansas, including the information hereafter furnished.

INTERSTATE RAILROADS

The railroads that own or operate trackage both within and without the State of Arkansas are as follows:

<i>Railroad</i>	<i>Total Miles Operated</i>
1. Missouri Pacific Railroad Company	9,223.04
2. Chicago R. I. & Pac. R. Co.	7,792.54
3. St. Louis San Francisco R. Co.	4,543.66
4. Texas & Pacific Ry. Co.	1,820.99
5. St. Louis Southwestern Ry. Co.	1,554.30
6. Kansas City Southern Ry. Co.	894.16
7. Louisiana & Arkansas R. Co.	745.51
8. Midland Valley Railroad Co.	381.90
9. Louisiana & Northwest R. Co.	76.74
10. Arkansas & Louisiana Mo. Ry. Co.	68.02
11. Arkansas Western Ry. Co.	39.48

[fol. 251] INTRASTATE RAILROADS

The railroads that own or operate trackage wholly within the State of Arkansas are as follows:

<i>Railroads</i>	<i>Total Miles Operated</i>
1. Warren & Saline River R. Co.	60.18
2. DeQueen & Eastern R. Co.	51.35
3. Ashley, Drew & Northern R. Co.	49.31
4. Prescott & Northwestern R. Co.	38.88
5. Graysonia, Nashville & Ashdown R. Co.	31.86
6. Reader Railroad	24.03
7. Warren & Ouachita Valley Ry. Co.	16.80
8. Bauxite & Northern Ry. Co.	14.62
9. El Dorado & Wesson Ry. Co.	13.54
10. Doniphan, Kensett & Searcy Ry.	10.38
11. Cotton Plant & Fargo Ry.	7.23
12. Dardanelle & Russellville R. Co.	6.49
13. Helena Southwestern Railroad Co.	4.73
14. Delta Valley & Southern Railway Co.	4.00
15. Fordyce & Princeton R. Co.	3.96
16. The Louisiana & Pine Bluff Ry. Co.	2.83
17. Augusta Railroad Co.	1.50

REVENUES

The total railway operating revenues during the calendar year 1963 for these railroads were in the following amounts:

<i>Railroads</i>	<i>Amounts</i>
Chicago, Rock Island & Pacific R. Co.	\$201,407,391
Kansas City Southern R. Co.	45,071,059
Missouri Pacific R. Co.	299,733,258
St. Louis Southwestern R. Co.	75,357,978
The Texas & Pacific R. Co.	70,888,510
St. Louis San Francisco R. Co.	120,753,987
Total	\$813,212,183

/s/ JENNIE L. FURR
Jennie L. Furr

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 14th day of October, 1964.

/s/ CAROLYN B. JAMES
Notary Public

My commission expires:
11-19-66

(Seal)

[fol. 252]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 7

STATE OF LOUISIANA)

)

PARISH OF CLAIBORNE)

AFFIDAVIT OF J. REUEL COLEMAN

J. Reuel Coleman, first having been duly sworn, states on oath as follows:

I am Vice President and General Manager of The Louisiana and North West Railroad Company, and in such capacity have personal knowledge of the facts hereafter related.

The Louisiana and North West Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Louisiana and operating as a common carrier by rail in the States of Louisiana and Arkansas. The main line of this railroad extends 61.5 miles from Gibsland, Louisiana, to McNeil, Arkansas, and there are two freight trains per day operated over this line daily except Sunday. There are two crews regularly employed and they run in opposite directions each day.

Motive power of this railroad is supplied by four diesel electric locomotives, and in 1963 operations consisted of 54,498 locomotive miles. In addition to the main line track above, this railroad owns and operates switching track, and

the aggregate amount of main line and switching track so owned and operated is 76.74 miles.

Operations in Louisiana are conducted with a freight train crew consisting of one engineer, one fireman, one conductor, and two brakemen. On any occasion that a train consists of 25 or more cars, a third brakeman is placed on the train before it is operated in Arkansas. All switching done in Arkansas is performed by the freight train crews, therefore while this Railroad is exempt from the Arkansas switch crew law because it owns and operates less than 100 miles of line, switching is necessarily done in Arkansas with six-man crews whenever there are as many as 25 cars in the train.

Except for the Arkansas crew consist laws, the crew consist on this railroad is fixed by collective bargaining agreements with the labor organizations representing the operating employees which are the Brotherhood of Railroad [fol. 253] Trainmen, Brotherhood of Locomotive Firemen and Enginemen, and Brotherhood of Locomotive Engineers.

The home terminal for all operating employees under the collective bargaining agreements is Gibsland, Louisiana, the south terminal of this railroad. If it is necessary to have an additional brakeman on a northbound train, he goes on duty on the train at Gibsland for the entire run because it is not feasible for him to board the train at the State line. From Gibsland, Louisiana, to the Arkansas State line is 36.5 miles, and from the State line to McNeil, Arkansas is 25.0 miles. If it is necessary to have a third brakeman on a southbound train from McNeil, Arkansas, he must be previously called from Gibsland, Louisiana. As a matter of practice, when it is expected that a southbound train will consist of 25 or more cars, an extra brakeman is placed on the northbound train on the prior day. If the northbound train upon which he is placed has less than 25 cars, he is paid one-half day's wages as a "deadhead". If the northbound train has 25 or more cars and therefore requires a six-man crew under the Arkansas law, then this third brakeman is paid a full day's wages for the northbound trip.

This Railroad has announced that it will take the necessary steps to reduce firemen's positions pursuant to the Award of Arbitration Board 282.

/s/ J. REUEL COLEMAN
J. Reuel Coleman

Subscribed and sworn to before me, a Notary Public, in and for the said Parish and State, this 9th day of October, 1964.

/s/ FRED B. COLVIN
Notary Public

(Seal)

[fol. 254]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 8

STATE OF LOUISIANA:
PARISH OF OUACHITA:

AFFIDAVIT OF J. W. KELLER

J. W. Keller, first having been duly sworn, states on oath as follows:

I am President of the Arkansas & Louisiana Missouri Railway Company, and in such capacity have personal knowledge of the facts hereafter related.

Arkansas & Louisiana Missouri Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Louisiana and operating as a common carrier by rail in Louisiana and Arkansas. The main line of this railroad extends from Monroe, Louisiana, to Crossett, Arkansas. This Company owns and operates in excess of 50 miles of track, but less than 100 miles of track.

Motive power consist of four (4) diesel locomotives, and in 1963 operations consisted of 92,164 locomotive miles. The freight train crew employed in Louisiana consists of

DeQueen and Eastern Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Arkansas and operating as a common carrier by rail entirely within the State of Arkansas. The main line of this Railroad extends from West Line, Arkansas, to Perkins, Arkansas. This Railroad owns and operates 45.72 miles of line and 5.63 miles of switching track.

Motive power consists of two diesel locomotives, and in 1963 operations consisted of 31,328 locomotive miles. There are 18 public road crossings at grade on this railroad.

All operations are conducted with a crew consisting of an engineer, fireman, conductor and two brakemen. The crew consist is fixed by collective bargaining agreements with the operating employees. The organizations with which this Company has such agreements are the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen.

This Railroad has operated with a freight crew of less than six men due to the exemption of railroads with less than 50 miles of line in the Arkansas freight crew law.

/s/ W. W. WARD
W. W. Ward

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 8 day of October, 1964.

/s/ T. R. SIMS
Notary Public

My Commission Expires Dec. 11, 1964

(Seal)

[fol. 256]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 10

STATE OF ARKANSAS)
) ss.
COUNTY OF BRADLEY)

AFFIDAVIT OF E. J. ANTHONI

E. J. Anthoni, first having been duly sworn, states on oath as follows:

I am General Manager of the Warren & Saline River Railroad Company, and in such capacity have personal knowledge of the facts hereafter related.

Warren & Saline River Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Arkansas and operating as a common carrier by rail entirely within the State of Arkansas. The main line of this railroad extends from Warren, Arkansas to Hermitage, Arkansas, and the entire railroad is within Bradley County, Arkansas. This Railroad owns and operates less than 18 miles of track, and in addition operates over 1.17 miles of trackage owned by Chicago, Rock Island & Pacific Railroad Company under trackage rights. This Company's annual report with the Arkansas Commerce Commission reflecting 42.76 miles operated under trackage rights is in error as it has been several years since this Company conducted any operations under trackage rights except for the 1.17 miles above mentioned.

Motive power consists of one diesel locomotive, and in 1963 operations consisted of 13,821 locomotive miles. Average operations consist of approximately five round trips per week between Warren and Hermitage. There are 10 public road crossings at grade on this railroad. The last accident on this railroad at a public grade crossing was in 1962. On that occasion an automobile ran into the side of the train and there were no personal injuries.

All operations are conducted with a crew consisting of [fol. 257] an engineer, fireman, conductor and two brakemen, and this has been the crew consist of this railroad since at least 1920.

/s/ E. J. ANTHONI
E. J. Anthoni

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 13 day of October, 1964.

/s/ M. R. FERGUSON
Notary Public

My Commission Expires July 25, 1967.

(Seal)

[fol. 258]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 11

STATE OF TEXAS)
) ss
COUNTY OF SMITH)

AFFIDAVIT OF W. H. HUDSON

I, W. H. HUDSON, a resident of the City of Tyler, Smith County, Texas, having been first duly sworn, on my oath depose and state:

I am Vice President of the St. Louis Southwestern Railway Company, hereinafter referred to as "Railway Company," with headquarters at 1517 West Front Street, Tyler, Texas. I have held that position since June 1957. In this capacity, I have the responsibility of managing operations of St. Louis Southwestern Railway Company, which operates in the States of Missouri, Illinois, Arkansas, Texas, Louisiana and Tennessee.

Commencing May 7, 1964, the Railway Company placed into effect Section II of the Award by Arbitration Board No.

282, made pursuant to Public Law 88-108 (88th Congress, August 28, 1963) pertaining to the elimination of firemen from freight trains and switch engines. On February 25, 1964, Railway Company served notice upon the labor organization representing brakemen and helpers (switchmen) for the elimination of certain brakeman-helper assignments as provided in Section III of the Award. Upon refusal of the organization to negotiate respecting said notice, a Special Board of Adjustment was established, as provided by Section III, Part B, and this Board rendered its Award on July 14, 1964, which permitted the Railway Company to eliminate certain brakeman-helper assignments. The Railway Company commenced placing the Award in effect on July 28, 1964.

Pursuant to the above-described Awards, Railway Company has eliminated a large number of fireman and brakeman-helper assignments in the states not having crew consist laws, and thereby has been able to reduce the cost of operations by a very substantial amount. The Arkansas crew consist laws have prevented such reduction of crews in Arkansas, except in the case of switching crews which do not operate over public crossings, and trains handling less than 25 cars.

Based on operations in the month of August 1964, Railway Company employs in Arkansas an approximate daily average of 57 road freight train crews and 30 yard switch crews. This includes all crews operating in whole or in [fol. 259] part in Arkansas. Due to the Arkansas crew consist laws, all of these crews consist of six men except for an approximate daily average of 1 freight train operated without a third brakeman or a fireman, 13 switch crews operated without a third helper or a fireman and 2 switch crews without a fireman. These crews of less than six men are assigned to switch engines that do not operate over public crossings or are assigned to freight trains handling less than 25 cars, and thus are within the exemptions of the applicable Arkansas crew consist laws.

Railway Company employs on the remainder of its system an approximate daily average of 49 freight train crews and 41 yard switch crews which do not operate in Arkansas.

Of the 49 freight crews, only 7 have three brakemen. These 7 third brakemen are all working on local freight trains in Texas. The third brakeman on these trains is not required by law but prior to the July 14, 1964 Award of the Special Board of Adjustment they were required on these trains by virtue of labor agreement between Railway Company and the Brotherhood of Railroad Trainmen. The Special Board of Adjustment decided that the third brakeman was not necessary on these trains and therefore such assignments are blankable. The 7 brakemen who are working on these trains as third brakemen are doing so by virtue of the protective provisions of the Award by Arbitration Board No. 282. Attrition will eventually eliminate the assignment of third brakemen on these trains.

Respecting the 41 switch crews operated wholly outside of Arkansas, only 4 have three helpers. These 4 third helpers are all working on switch engine assignments in Texas. The third helper on these switch engines is not required by law. Three of these assignments, prior to the July 14, 1964 Award of the Special Board of Adjustment, were required by virtue of labor agreement between Railway Company and the Brotherhood of Railroad Trainmen. The Special Board of Adjustment decided that the third helper was not necessary on these three switch engines and therefore such assignments are blankable. The 3 helpers who are working on these switch engines as third helpers are doing so by virtue of the protective provisions of the Award by Arbitration Board No. 282. Attrition will eventually eliminate the assignment of third helpers on these three switch engines.

[fol. 260] Respecting all freight and all switch crews operating wholly outside of Arkansas, 57 are operated without a fireman. The firemen have been removed from these assignments under the provisions of the Award of Arbitration Board No. 282, and attrition will produce a further progres-

sive reduction in the number of firemen employed in these crews.

The wages of firemen, brakemen and helpers (switchmen) are fixed by collective bargaining agreements between the Railway Company and the labor organization representing the employees. The range of basic pay so prescribed per day is:

	<i>Highest</i>	<i>Lowest</i>
Fireman	\$25.79	\$18.56
Brakeman	21.32	18.40
Helper (switchman)	23.20	

The above figures do not include overtime and arbitrarier which most of such employees receive.

The additional brakeman and fireman required to comply with the Arkansas crew consist laws go on duty on trains bound for Arkansas considerable distances from the Arkansas state line. Likewise, such employees on trains leaving Arkansas do not go off duty at the time the state line is crossed. The following are examples:

1. Local freight train operates daily, except Sunday, from Shreveport, Louisiana, to Lewisville, Arkansas, and return, with a total run of approximately 76 miles in Louisiana and 48 miles in Arkansas. A fireman and third brakeman are on duty on the entire run.
2. Four daily through freight trains operate between Shreveport, Louisiana and Pine Bluff, Arkansas, a distance of approximately 38 miles in Louisiana and 151 miles in Arkansas. A fireman and third brakeman are on duty on the entire run.
3. Twelve daily through freight trains operate between East St. Louis, Illinois and Jonesboro, Arkansas. The six southbound trains are operated with two brakemen from East St. Louis to Malden, Missouri, where a third brakeman is added to ride to Jonesboro, Ar-

[fol. 261] kansas, a distance of approximately 10 miles in Missouri and 57 miles in Arkansas. Usually the sole reason the train is stopped (or slowed) at Malden is to take on the additional brakeman. The same procedure is employed on the six northbound trains with the third brakeman boarding the train at Jonesboro and leaving it at Malden. Where permitted under Award of Arbitration Board No. 282, these trains are also operated without a fireman from East St. Louis, Illinois to Illmo, Missouri, where a fireman is added to ride to Jonesboro, Arkansas, a distance of approximately 74 miles in Missouri and 57 miles in Arkansas. The same procedure is employed in the opposite direction with the fireman boarding the train at Jonesboro, Arkansas and leaving it at Illmo, Missouri.

4. Two local freight trains operate daily, except Sunday, between Illmo, Missouri and Jonesboro, Arkansas, a distance of approximately 74 miles in Missouri and 57 miles in Arkansas. A fireman and third brakeman are on duty on the entire run.

Five switch engines are operated daily at Texarkana which perform most of their work in Texas where neither a third helper nor a fireman is required by law but because they are subject to performing work in Arkansas a third helper and a fireman are assigned to such switch engines at all times.

/s/ W. H. HUDSON
W. H. Hudson

Subscribed and sworn to before me this 14th day of October, 1964.

/s/ H. C. KOELLING
Notary Public

My commission expires
June 1, 1965.

(Seal)

[fol. 262]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 12

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

AFFIDAVIT OF JOHN H. LLOYD

I, JOHN H. LLOYD, a resident of the City of Richmond Heights, St. Louis County, Missouri, having been first duly sworn, on my oath depose and state:

I am Vice President—Operations of the Missouri Pacific Railroad Company, with headquarters at 210 North Thirteenth Street, St. Louis, Missouri. I have held that position since June 1, 1961. I am also Vice-President—Operations of The Texas and Pacific Railway Company, a subsidiary of the Missouri Pacific, with headquarters in Dallas, Texas. In these capacities I have the responsibility for managing operations of these two railroads and their several subsidiary lines.

Commencing January 25, 1964, the effective date of the Award by Arbitration Board No. 282, made pursuant to Public Law 88-108 (88th Congress, August 28, 1963), the Missouri Pacific, The Texas and Pacific and their subsidiaries served notices upon the labor organizations representing brakemen and helpers for the elimination of certain brakeman-helper assignments as provided in Section III of the Award. Upon refusal of the organization to negotiate respecting said notices, Special Boards of Adjustment were established, as provided by Section III, Part B, and these Boards rendered their decisions on May 6, 1964, which permitted the companies to eliminate certain brakeman-helper assignments. After some delay due to litigation, these decisions were put into effect on June 12, 1964.

[fol. 263] With respect to Section II of the Award, pertaining to the elimination of firemen on other than pas-

senger trains, the railroads and the Brotherhood of Locomotive Firemen and Enginemen had agreed and filed a stipulation postponing the effective date of Part B (5), Part C and Part D thereof until ten days after the Supreme Court of the United States either granted or denied the Brotherhood's petition for writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia, dated February 20, 1964, affirming the decision of the District Court, entered on January 8, 1964. The petition for certiorari was denied by the United States Supreme Court on April 27, 1964, and Section II theretofore became effective on May 7. On that date, the Missouri Pacific, The Texas and Pacific and their subsidiaries placed Section II of the Award into effect by separating firemen from the service, pursuant to Part C of the Award. Up to this date, a total of 314 firemen have been so separated.

Pursuant to the above-described Awards and decisions, these companies have eliminated a large number of fireman and brakeman assignments in the states not having crew consist laws, and thereby have been able to reduce the cost of operations by a very substantial amount. The Arkansas full crew laws have prevented such reduction of crews in Arkansas, except in the case of switching crews which do not operate over public crossings, and trains handling less than 25 cars.

Missouri Pacific Railroad Company, and its subsidiaries, employ in Arkansas an approximate daily average of 94 freight train crews and 67 switch train crews. This includes all crews operating in whole or in part in Arkansas. Due [fol. 264] to the Arkansas crew consist laws, all of these crews consist of six men except for an approximate daily average of 2 freight trains operated without a third brakeman, 19 switch crews operated without a third switchman, and 20 crews (freight and switch) operated without a fireman. These crews of less than six men are assigned to switch trains that do not operate over public crossings or are assigned to trains handling less than 25 cars, and thus

are within the exemptions of the applicable Arkansas crew consist laws.

Missouri Pacific Railroad Company and its subsidiaries employ on the remainder of the system an approximate daily average of 369 freight train crews and 396 switch crews which do not operate in Arkansas. Of the 369 freight train crews, approximately 200 daily have as many as three brakemen. Of the 396 switch crews operated wholly outside of Arkansas, approximately 175 per day have as many as three helpers.

The third brakeman or the third helper employed on the crews outside of Arkansas are so employed only because of the protective conditions of Part D, Section III of the Award. As these protected men leave the service, new men are not and will not be hired to replace them.

Respecting all switch and freight crews operating wholly outside of Arkansas, 245 are operated without firemen. The firemen have been removed from these assignments under the provisions of the Award of Arbitration Board No. 282, and attrition will produce a further progressive reduction in the number of firemen employed in these crews.

The wages of firemen, brakemen and switchmen are fixed by collective bargaining agreements between the Railroad Company and the labor organizations representing the [fol. 265] employees. The range of pay so prescribed per day is:

	<i>Highest</i>	<i>Lowest</i>
Fireman		
(road service)	\$22.72	\$18.56
Fireman		
(yard service)	28.83	22.50
Brakeman	20.77	18.40
Switchman		
(helper)	23.20	23.20

The above figures do not include overtime or mileage in excess of 100 per day although many road firemen and brakeman receive such additional pay.

For various reasons, the additional employee or employees necessary to comply with the Arkansas crew consist laws usually go on duty on a train bound for Arkansas some distance from the Arkansas State line. Likewise, such employees on a train leaving Arkansas usually do not go off duty at the time the State line is crossed. The following are examples:

1. Local freight operating from Crane, Missouri, to Cotter, Arkansas, with a run with 54.59 miles in Arkansas and 41.65 miles in Missouri. The additional employee, or employees, are on duty on the entire run.

2. Train No. 201. Kansas City, Missouri, to Newport, Arkansas. This train operates with two brakemen from Kansas City to Crane, Missouri, a distance of 198 miles. A third brakeman is added at Crane for the run from there to Newport, Arkansas, a distance of 41.65 miles in Missouri and 180.35 miles in Arkansas.

3. Train No. 202. Newport, Arkansas, to Kansas City, Missouri. The reverse of the procedure on Train No. 201 is used. The additional employees ride from Newport, Arkansas, to Crane, Missouri.

[fol. 266] 4. There are four regularly assigned freight trains per day between Coffeyville, Kansas, and Van Buren, Arkansas. These are operated with two brakemen from Coffeyville, Kansas, to Greenwood Junction, Oklahoma, where a third brakeman is added to ride to Van Buren, Arkansas, a distance of 6.38 miles. The sole reason the train is stopped (or slowed) at Greenwood Junction is to take on the additional man. The same procedure is employed in the opposite direction, with the third brakeman boarding the train at Van Buren and leaving at Greenwood Junction. When attrition permits abolition of the position of fireman on these runs under the Award of Arbitration Board No. 282, it will be necessary to employ firemen for this 6.38-mile run between Greenwood Junction and Van Buren to comply with the Arkansas law.

5. There are approximately two trains per day running between St. Louis, Missouri, and North Little Rock, Arkansas, and eleven per day between Dupo, Illinois, and North

Little Rock, via Poplar Bluff, Missouri. In Missouri and Illinois, these thirteen trains are operated with two brakemen, and where permitted under the Award of Arbitration Board No. 282, they are also operated without a fireman. A third brakeman is added at Poplar Bluff, Missouri, for the run to North Little Rock, a distance of 20.71 miles in Missouri and 157.39 miles in Arkansas. A fireman is also placed on all southbound trains at Poplar Bluff. On northbound trains, a crew of six complying with the Arkansas law takes the train into Poplar Bluff, and a crew of four or five takes it from Poplar Bluff to St. Louis, a distance of 165 miles, or to Dupo, a distance of 191 miles.

[fol. 267] 6. There are approximately six trains per day running between McGehee, Arkansas, and Monroe, Louisiana, a distance of 49.13 miles in Arkansas and 48.31 miles in Louisiana. A third brakeman is assigned to the train from McGehee, Arkansas, to Jones, Louisiana, a distance of 49.13 miles in Arkansas and 3.13 miles in Louisiana, and the train operates between Jones, Louisiana, and Monroe, Louisiana, with only two brakemen on duty.

7. Trains are regularly operated between Ferriday, Louisiana, and Eudora, Arkansas, Delhi, Louisiana, and McGehee, Arkansas, and Monroe, Louisiana, and El Dorado, Arkansas. There are a total of approximately four trains per day on these runs. In each instance, a 6-man crew is assigned to the entire run because it would be impracticable to board or remove the additional employee or employees necessary to comply with Arkansas law at the State line.

/s/ JOHN H. LLOYD
John H. Lloyd

SUBSCRIBED AND SWORN to before me, a Notary Public, within and for the City of St. Louis, State of Missouri, this 15th day of October, 1964.

/s/ R. C. MASON
Notary Public

My commission expires
Sep. 28, 1966.

(Seal)

[fol. 268]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 13

STATE OF ARKANSAS)
) ss.
COUNTY OF SALINE)

AFFIDAVIT OF JAMES DAVIES

James Davies, first having been duly sworn, states on oath as follows:

I am General Manager of the Bauxite & Northern Railroad Company, and in such capacity have personal knowledge of the facts hereafter related.

Bauxite and Northern Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Arkansas and operating as a common carrier by rail entirely within the State of Arkansas. This Company owns and operates 14.62 miles of track and the line runs from Bauxite, Arkansas, to Bauxite Junction, Arkansas, where it connects with Missouri Pacific Railroad Company, and also from Bauxite to Gibbons where it connects with Chicago, Rock Island & Pacific Railroad Company. Depending upon the volume of traffic, two or three crews are usually employed daily. These crews consist of an Engineer, Conductor and two Brakemen. In addition, there are two firemen employed by this Company with over ten years' service and who are entitled to continued employment under the Award of Arbitration Board No. 282, and therefore they are employed as firemen except for the occasions when their position on the engineer's seniority roster permits using them as engineers.

Motive power is supplied by two diesel locomotives, and in 1963 operations consisted of 39,099 locomotive miles, 147,041 freight car miles, and produced railway operating income of \$648,725. The consist of crews on this Railroad is fixed by agreement with the labor organizations repre-

laws of the State of Arkansas and operating as a common carrier by rail entirely within the State of Arkansas. The main line of this railroad extends 41.57 miles from Crossett, Arkansas, to Monticello, Arkansas, and one freight train is operated each way over this track daily except Sunday. The approximate average number of cars in these trains is 57 northbound and 25 southbound. Track is predominantly 90-pound rail, with some 85 pound rail. There are 45 crossings of public roads at grade on the main line, and the only automatic crossing protective device on the system is a flasher light and bell installation at the crossing at Fountain Hill, Arkansas. Maximum speed on main track is 35 miles per hour.

Switching operations are conducted over public crossings in Monticello and Crossett, and there are four switch crews, three of which operate six days per week and one seven days per week.

Motive power of this railroad is supplied by two 70-ton General Electric diesel electric locomotives and three Electro-Motive 124-ton diesel electric locomotives. During the calendar year 1963, operations consisted of 93,252 locomotive miles, 24,928 train miles, and 876,110 car miles, and [fol. 271] produced railway operating revenues of \$1,457,287. The Railroad owns 210 cars of which 120 are used in interchange service. Connecting railroads with which interchange service is conducted are Missouri Pacific Railroad Company, Chicago, Rock Island & Pacific Railroad Company, and Arkansas & Louisiana Missouri Railway Company.

Both freight and switching operations are conducted with five-man crews. The crew consist is fixed by collective bargaining agreements with the labor organizations representing the employees and the pertinent provisions are as follows:

Collective bargaining agreement with Brotherhood of Railroad Trainmen, Article 18, Section (i):

"Each train and yard crew shall consist of a Conductor and not less than two Brakemen."

Collective bargaining agreement with Brotherhood of Locomotive Firemen and Enginemen, Rule 8, Section 1:

"In the event Diesel, Electric, Oil Electric, Gas Electric, Electric, Locomotive, or other power is installed as a substitute for steam on the Company's railroad, an engineer from the seniority roster of engineers and a fireman from the seniority roster of firemen shall be employed on all such power in both road and yard service and rates of pay shall remain as on steam locomotives."

/s/ E. A. TEMPLE
E. A. Temple

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 2 day of October, 1964.

/s/ C. S. LOVE
Notary Public

My Commission Expires Jan. 10, 1966

(Seal)

[fol. 272]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD
COMPANY, et al, Plaintiffs,

v.

Civil Action No. 944

LAWSON E. GLOVER, et al., Defendants.

ORDER GRANTING EXTENSION OF TIME TO
RESPOND—November 3, 1964

On this November 3, 1964, comes on for consideration motions of defendants and intervenors for extension of

time to file responses to plaintiffs' motion for summary judgment in the above entitled cause, and in accordance with letter opinion of this date,

It Is Ordered that the said motions for extension of time be and hereby are granted, and that the time for the defendants and intervenors to file and submit their responses, and to serve and submit briefs in support thereof and in opposition to the motion for summary judgment, be and hereby is extended to December 5, 1964.

Jno. E. Miller, United States District Judge.

[fol. 273]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD
COMPANY, et al., Plaintiffs,

v.

Civil Action No. 944

LAWSON E. GLOVER, et al., Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al., Intervenors.

DEFENDANTS' RESPONSE TO MOTION FOR SUMMARY
JUDGMENT—Filed December 7, 1964

Come the defendants, Lawson E. Glover and John W. Goodson, in their official capacities as Prosecuting Attorneys, by Bruce Bennett, Attorney General, and Jack L.

[File endorsement omitted]

Lessenberry, Chief Assistant Attorney General for the State of Arkansas, and state:

1. That defendants deny each of the allegations contained in the Motion for Summary Judgment as originally traversed in their Answer to Complaint.

2. That Exhibits 5, 7, 8, 9, 10, 11, 12, 13 and 14 contain statements and allegations that are entirely immaterial to the consideration of the Motion for Summary Judgment but may be material to other issues of the case in whole. That portions of said Exhibits are material, but simply amount to comments on disputed facts. That in several instances the affiant makes declarations on matters in derogation of the "best evidence rule." That the form of submitting these matters as exhibits does not alter the fact that some of the statements contained in the exhibits amount to mere self serving statements. That the exhibits [fol. 274] noted comprising testimony in its present form are improper and inadmissible. That the number and length of the exhibits together with the instances of objectionable material makes it impractical that only specified portions of the exhibits be disregarded. That because the foregoing listed deficiencies in these affidavits, they are not in compliance with the requirements of Rule 56 (e) which provides that the facts contained in such affidavits must set forth facts that would be admissible in evidence.

Wherefore, defendants pray that Exhibits 5, 7, 8, 9, 10, 11, 12, 13 and 14 being invalid in part be disregarded in toto, that the Motion for Summary Judgment be denied, and such other proper relief.

Bruce Bennett, Attorney General, By Jack L. Lessenberry, Chief Assistant Attorney General, Attorneys for Defendants.

[fol. 275]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MIS-
SOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRAN-
CISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY
COMPANY, Plaintiffs,

v. Civil Action No. 944

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, successor in office to
LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting
Attorney for the Eighth Judicial Circuit of Arkansas,
Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF
RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Intervenors.

Before Van Oosterhout, Circuit Judge, and Miller and
Henley, District Judges.

John E. Miller, District Judge.

OPINION—March 5, 1965

Plaintiffs' motion for summary judgment under the pro-
visions of Rule 56, Fed.R.Civ.P., is before the court for

[File endorsement omitted]

disposition. The parties have served and submitted elaborate and thorough briefs in support of their respective contentions, and none of the parties has requested oral argument, but in view of the extensive briefs, the court does not believe any useful purpose would be served by oral argument and the motion has been considered upon the exhibits thereto, the affidavits, the pleadings and briefs.

Before discussing the questions presented by the motion, we believe it would be helpful to briefly outline the pleadings, other motions filed by intervenors prior to the filing of the motion for summary judgment, and the action of the court on such motions.

[fol. 276] The complaint was filed April 10, 1964.¹ Paragraphs 1, 2 and 3 of the complaint are jurisdictional allegations. Paragraph 4 contains allegations of identity of the plaintiffs, and alleged that they are engaged in the transportation of property in interstate commerce over railroads which they own and operate in the State of Arkansas and numerous other states; that each plaintiff owns and operates lines more than 100 miles in length, regularly operates freight trains in Arkansas consisting of more than 25 cars, and regularly conducts switching operations in cities of the first and second class across public crossings, that by reason of such operations they are subject to the provisions of Act 116 of the Acts of Arkansas of 1907, Exhibit A²

¹ All dates referred to are of the year 1964 unless otherwise noted.

² Sections 1, 2 and 3 of Act 116 of 1907 appear as Sections 73-720 to 73-722, inclusive, Ark. Stat. Ann. (1957 Repl.), and are as follows:

"73-720. Crew required on freight trains.—No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

"73-721. Exceptions from act—Purpose.—This Act shall not apply to any railroad company or officer of court whose line

to complaint, and Act 67 of the Acts of Arkansas of 1913, Exhibit B³ to complaint.

or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

*"73-722. Penalty for violations—Exceptions.—*Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars (\$100.00) nor more than five hundred dollars [fol. 277] (\$500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved."

Section 4 of Exhibit A merely repeals all laws and parts of laws in conflict therewith.

³ Sections 1, 2, 3 and 4 of Act 67 of 1913, Exhibit B, appear as Sections 73-726 to 73-729, inclusive, Ark. Stat. Ann. (1957 Repl.), and are as follows:

*"73-726. Switch crews in cities—Requisite members.—*No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one (1) engineer, a fireman, a foreman and three (3) helpers.

"73-727. Purpose of act—Number in crew may be increased. It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one (1) engineer, a fireman, a foreman and three (3) helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or in-

[fol. 278] Paragraph 5 identifies the defendants as Prosecuting Attorneys in their respective circuits of Arkansas, and it is alleged therein that by virtue of the duties imposed upon them by law and by virtue of their oaths of office, they are threatening to enforce the penalties of these Acts and will enforce the penalties unless restrained by this court.

In paragraphs 6, 7 and 8 it is alleged:

"(6) As applied to these plaintiffs, these Acts are in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they are arbitrary, capricious, discriminatory and unreasonable in their operation and bear no reasonable relationship to the purported purpose of safety to employees and the public.

"(7) As applied to these plaintiffs, these Acts are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution in that they single out the railroad industry in the State of Arkansas, of which plaintiffs are a part, and impose by statute upon it alone, arbitrary, inflexible requirements as to the minimum number of employees which must be assigned in its business as therein provided.

creasing their switch crew or crews beyond the number set out in this Act.

"73-728. *Application of act to cities of first and second class—Exception.*—The provisions of this Act shall only apply to cities of first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred (100) miles in length.

"73-729. *Penalty for violation of act.*—Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars (\$50.00), and each crew so illegally operated shall constitute a separate offense."

Section 5 merely provides that the Act shall take effect and be in force after May 1, 1913. However, Section 5 was probably in conflict with Amendment No. 10 to the Constitution of Arkansas, known as the Initiative and Referendum Amendment. See *Arkansas Tax Commission v. Moore*, 103 Ark. 48, 145 S.W. 199 (1912).

"(8) As applied to these plaintiffs, these Acts are in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause, in that they impose upon plaintiffs' conduct of interstate commerce unreasonable and arbitrary requirements constituting a direct interference with, burden upon, and impediment of such commerce, and in that they greatly and unreasonably increase plaintiffs' operating costs within the State of Arkansas. . . . In addition to the financial burden imposed on plaintiffs by these Acts, they further operate to unduly and unreasonably burden interstate commerce in that some plaintiffs are required to stop or slow interstate trains at various points entering and leaving the State of Arkansas for the sole purpose of loading or unloading employees who are unnecessary to the safe and efficient operation of these trains, and such interstate commerce is therefore unreasonably delayed."

In paragraph 9 it is alleged that the Acts are also in violation of the Commerce Clause in that they discriminate against interstate commerce in favor of local or intrastate commerce. Act 116 of 1907 applies only to plaintiffs and seven other interstate railroads operating in Arkansas, because each of the twelve interstate railroads operating in Arkansas owns and operates in excess of 50 miles of line; the Act exempts all sixteen of the intrastate railroads operating in Arkansas because each has less than 50 miles of line; Act 67 of 1913 exempts all intrastate railroads and [fol. 279] penalizes only plaintiffs and two other interstate railroads with at least 100 miles of line; and this classification "constitutes a direct, substantial and discriminatory burden upon interstate commerce."

Paragraphs 10, 11, 12 and 13 deal only with prior litigation⁴ concerning these Acts, and paragraph 13 concludes:

⁴ The first attack upon Act 116 of 1907 is reported in Chicago, R.I. & Pac. Ry. Co. v. Arkansas, 86 Ark. 412, 111 S.W. 456 (1908). The attack was predicated upon the claim that the Act attempted to regulate interstate commerce, that it was arbitrary, unreasonable

"The Acts are therefore unconstitutional as applied to all plaintiffs for the reasons set out in Paragraphs 6, 7, 8 and 9."

and contrary to the Due Process Clause of the Fourteenth Amendment, and that it was in violation of the Equal Protection Clause of the Constitution. The Act was sustained by the Supreme Court of Arkansas, and upon appeal the Supreme Court of the United States affirmed, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290 (1911). At page 466 of 219 U.S., the court said:

"Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and state."

In *St. L. & Iron Mtn. Ry. v. Arkansas*, 114 Ark. 486, 170 S.W. 586 (1914), Act No. 67 of 1913 was attacked on the ground that the Act was in violation of the Commerce Clause and Due Process and Equal Protection provisions of the Fourteenth Amendment of the Constitution of the United States. The Arkansas court held that the General Assembly of the State may pass laws as police regulations and may specify specific acts of care to be observed by railroads for the safety of employees and the public, and that the validity of such a statute cannot be tested by exceptional cases "for the law makers are presumed to legislate with reference to general conditions and not to exceptional cases, and this they have the power to do." On appeal, 240 U.S. 518, 36 S.Ct. 443, 60 L.Ed. 776 (1916), the court reviewed its earlier decision in *Chicago R.I. & Pac. Ry. Co. v. Arkansas*, supra, and affirmed the judgment of the Supreme Court of Arkansas. At page 521 of 240 U.S., the court said:

"We have recognized the impossibility of legislation being all comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself although there may be exceptions in which the evil aimed at is deemed not so flagrant."

[fol. 280] Both the 1907 and 1913 Acts were again attacked in *Mor. Pac. R. Co. v. Norwood* (W.D. Ark. 1930), 42 F.2d 765. The plaintiff contended that the statutes violated the Fourteenth Amendment

Paragraphs 14, 15, 16, 17, 18, 19, 20 and 21 are factual allegations relative to the enactment of Public Law 88-108, August 28, 1963 (Plaintiffs' Exhibit 3).

and the Interstate Commerce Act, as amended by the Transportation Act of 1920. The three-judge district court sustained a motion to dismiss. In disposing of the plaintiff's claim predicated upon the Fourteenth Amendment, the court stated:

"Defendants' claim as to this is advanced in the motion to dismiss and is that the validity of these two statutes has been sustained. That position is well taken."

The court at page 767 then referred to the decisions heretofore mentioned as authority for the court's conclusion that the statutes were constitutional. The court also held, quoting from *Chicago, R.I. & Pac. R. Co. v. Arkansas*, supra, that the Congress in its discretion may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce, but that the Congress had not done so. The motion to dismiss was sustained and the plaintiff's complaint dismissed. The case was appealed to the Supreme Court, which on April 13, 1931, affirmed the judgment of the district court, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010, and held that the complaint failed to allege facts sufficient to distinguish the case from the others in which the court had sustained the same statutes. The court further held that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews. The plaintiff filed its motion to modify the mandate so as to permit filing of an amended petition. The mandate was modified to an affirmance "without prejudice to any application to the district court to amend the pleadings or otherwise," 283 U.S. 809, 51 S.Ct. 652, 75 L.Ed. 1428. Subsequently the plaintiff amended its petition or complaint and the claim on the amended petition or complaint went to trial before the District Court (W.D. Ark. 1933), 13 F.Supp. 24. The three-judge district court reviewed the prior litigation and background, and held that the issues of constitutionality and invasion of the field under the Interstate Commerce Act had been settled by the Supreme Court in its prior decisions, citing 219 U.S. 453, 240 U.S. 518, 283 U.S. 249. The District Court appointed a Master, and in the order confined the evidence to two lines of inquiry, see pages 25 and 26 of 13 F.Supp. After reviewing the testimony, the court announced the following conclusions of law, page 37, 13 F.Supp.:

"I. All attacks upon the validity of the two statutes here involved, except that based upon the claimed violation of the

Paragraphs 22, 23, 24 and 25 are allegations of the proceedings that followed the enactment of Public Law 88-108 and the award and opinion issued November 26, 1963, by the Arbitration Board.

In paragraph 26 the plaintiffs alleged that as a result of the award "the federal government has entered the field pertaining to regulation of manning of trains and locomotives and, by reason of the Commerce Clause and Supremacy Clause of the United States Constitution, has pre-empted the State of Arkansas' power and authority to enforce state legislation inconsistent with, and contrary to, that Award."

In paragraph 27 plaintiffs alleged:

"The enforcement of Exhibits 'A' and 'B' will frustrate, hinder and prevent the execution and operation in Arkansas of Public Law 88-108, and the Award made pursuant thereto, and would further frustrate and

Fourteenth Amendment, are resolved against plaintiff because the same contentions have heretofore been so adjudged by the Supreme Court. *Chicago, R.I. & P. Ry. Co. v. Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290; *St. Louis, I.M. & S. Ry. Co. v. Arkansas*, 240 U.S. 518, 36 S.Ct. 443, 60 L.Ed. 776; *Missouri Pac. R. Co. v. Norwood et al.*, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010.

[fol. 281] "II. The attack based upon asserted violation of the Fourteenth Amendment is founded on the claim that present conditions affecting applications of these statutes are so different from those existing when the statutes were enacted as now to make the statutes unreasonable and arbitrary and, therefore, a deprivation of property without due process of law. The findings of fact being that the laws as now applied are not clearly unreasonable and arbitrary, the court concludes that plaintiff is not deprived of its property without due process of law, and that the statutes are valid."

The case was appealed to the Supreme Court, and on December 11, 1933, the court in a per curiam opinion said:

"The court sees no reason to disagree with the determinations of fact reached by the District Court. The decree is affirmed."

Missouri Pac. R. Co. v. Norwood, 290 U.S. 600, 54 S.Ct. 227, 78 L.Ed. 527.

prevent the nationally uniform operation of federal legislation intended by the Congress to provide a uniform solution to a national problem."

[fol. 282] In paragraph 28 the plaintiffs alleged that they have no adequate remedy at law, and that unless the court enters a judgment declaring the Acts of Arkansas void and invalid and restrains and enjoins the defendants from the enforcement of the Acts, plaintiffs will either be compelled to bear the heavy burden and cost of complying with these Acts or will be exposed to prosecution for violation of the laws. The prayer of the complaint was in accordance with the allegations of the complaint.

On April 13, the Chief Judge of the Eighth Circuit, Hon. Harvey M. Johnsen, designated the acting Judges "as members of a Three-Judge District Court to hear and determine said action and proceeding."

On April 29 the intervenors named in the caption hereof filed a motion for permission to intervene. On May 8 an order was entered granting such leave and allowing intervenors 60 days in which to plead. On July 6 intervenors filed a motion to dismiss the complaint "for failure to state a claim upon which relief should be granted." On July 31 intervenors filed a motion to dismiss for failure to "establish statutory jurisdiction for a Three-Judge Federal Court."

On May 11 the defendants upon their motion were allowed 60 days in which to answer or otherwise plead. The answer of defendants was filed July 10, substantially denying allegations of the complaint and specifically denying paragraphs 26 and 27. In paragraph 13 of the answer the defendants admitted that in the event plaintiffs do not comply with the Acts, they will be exposed to prosecution for violation.

Simultaneously with the filing of the motion of intervenors to dismiss for lack of jurisdiction, they also moved for an order setting consolidated oral argument on the motion to dismiss for failure to state a claim and the motion to dismiss for lack of statutory jurisdiction. On Au-

gust 19 the motion for order setting consolidated argument [fol. 283] on the motions was denied and overruled. On August 25 by separate orders the court overruled both the motions.

On September 4 the answer of intervenors was filed, in which they denied that the "Arkansas Statutes in controversy are void and unconstitutional." In paragraph 4 of their answer the intervenors alleged:

"Intervenors specifically deny each and every allegation of paragraphs 6, 7, 8, 9 and 13, together with all assertions of law and implications of fact therein, except that Intervenors admit the allegation in paragraph 7 that plaintiffs each operate railroads of more than 100 miles and there are other railroad companies in Arkansas with less than 100 and less than 50 miles of line and that Act 116 of 1907 applies to 12 railroads operating in Arkansas and Act 67 of 1913 applies to 8 railroads operating in Arkansas."

In paragraph 9 of the answer the intervenors alleged:

"Intervenors specifically deny the allegations of paragraphs 26 and 27 of the complaint that the federal government has pre-empted the field of local railroad operations concerning the consist of crews through Public Law 88-108, the Special Arbitration Award, or executive branch pronouncements or actions so as to prevent the operation of the Arkansas Statutes in controversy."

On September 15 intervenors filed identical motions to require each of plaintiffs to produce certain named documents pursuant to Rule 34, Fed.R.Civ.P. On September 16 plaintiffs filed their response to the motion in which, *inter alia*, they stated:

"That plaintiffs will file a motion for summary judgment herein in the near future on the grounds (a) that the state laws in question are pre-empted by fed-

eral legislation and (b) that the state laws in question constitute discriminatory legislation against interstate commerce in favor of intrastate commerce in contravention of the Commerce Clause of the Constitution of the United States. The documents sought by the motions are not relevant to the issues that will be raised by the motion for summary judgment, if summary judgment is granted they will never become relevant in this litigation, and therefore the very burdensome task of producing such documents should be deferred until disposition of the motion for summary judgment."

On September 18 the court entered an order that hearing and action on the motions "be deferred until the filing and disposition of the motion for summary judgment which plaintiffs contemplate filing, as set forth in their response, or until the further orders of the court."

[fol. 284] The motion for summary judgment was filed October 17, and as grounds therefor the plaintiffs alleged:

"1.

"That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 are pre-empted by federal legislation in conflict therewith, to-wit: Public Law 88-108 and the award of Arbitration Board No. 282 pursuant thereto; the Railway Labor Act, Title 45, United States Code, Sections 151 et seq.; and the Interstate Commerce Act, Title 49, United States Code, Sec. 1 et seq., and particularly the preamble thereto (49 U.S.C., preceding Sec. 1).

"2.

"That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 constitute discriminatory legislation against interstate commerce in favor of intrastate commerce in contravention of the Commerce Clause of the Constitution of the United States.

"3.

"That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 constitute a denial of the equal protection of the laws to plaintiffs in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

"4.

"That there is no genuine issue as to any material fact relating to the foregoing allegations."

In the second paragraph of the introductory statement of plaintiffs' brief in chief, they stated:

"The legal questions presented are whether federal law has superseded state regulation in the area of railroad crew consist, whether these state laws constitute prohibited discrimination against interstate commerce, and whether they deny plaintiffs equal protection of the law. The Court's ruling on those issues, in effect, will resolve the important question of whether the plaintiff railroads are to continue to sustain a massive financial burden. It is unnecessary to calculate the precise cost of compliance with these laws in order to pass on the questions raised by the Motion. The annual cost of compliance to plaintiffs is alleged in the Complaint to exceed \$6,000,000. Intervenor's in paragraph 7(b) of their Answer alleged such cost to be 'not significantly higher' than 1% of plaintiffs' total revenues. Plaintiffs' total revenues during 1963 are indicated by Plaintiffs' Exhibit 6 to have been \$813,212,183, thus 1% would be \$8,132,122. It is sufficient for the purpose of this Motion that the cost of compliance is undisputed to be a very large sum."

The court has jurisdiction of the subject matter and the parties. *The Bordon Co. v. Liddy*, (8 Cir. 1962) 309 F.2d 871; *Kessler v. Dept. of Public Safety of Utah*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962).

[fol. 285] The relevant facts as set forth in the affidavits and exhibits to the motion for summary judgment are not controverted, and "there is no genuine issue as to any material fact" relevant to the questions raised by the allegations in paragraph number one of the motion.

The contention of plaintiffs on the question of pre-emption is stated in their brief as follows:

"It is the position of plaintiffs that Public Law 88-108, The Railway Labor Act of which it became a part, and the Interstate Commerce Act constitute occupation by the Congress of the field of regulation of railroad crew consist to the exclusion of such regulation by the states."

In the first paragraph of the Message from the President of the United States to the Congress, July 22, 1963, the President stated:

"This Nation stands on the brink of a nationwide rail strike that would, in very short order, create widespread economic chaos and distress. After more than 31½ years of constant but fruitless attempts to achieve a peaceful settlement between the parties through every private and public means available, this dispute has reached the point where only prompt and effective congressional action can assure that serious injury to the public will be prevented."

The entire message with the various reports and appendices were introduced as plaintiffs' Exhibit 1. It is House Document No. 142.

Briefly stated, on November 2, 1959, virtually all the Nation's railroads served upon the five railroad operating Brotherhoods (intervenors), notices pursuant to Section 6 of the Railway Labor Act, 45 U.S.C., Sec. 156, proposing changes in existing collective bargaining agreements relating to the use of firemen, the consist of train crews, and other subjects. On September 7, 1960, the Brotherhoods

served joint notices pursuant to the same statute upon the railroads relating to the consist of both engine and train crews and other subjects.

The gist of the railroads' proposals with regard to crew consist was to eliminate prior agreements requiring the use of firemen and various stipulated numbers of other crew members and to restore these matters to management discretion and decision. The proposals of the Brotherhoods in this area were to establish new national rules fixing the minimum crew consist on all locomotives as an engineer and a fireman and a minimum crew of three trainmen in all freight and yard assignments. On November 1, 1960, a Presidential Railroad Commission was established to investigate the facts and make recommendations for the resolution of the dispute arising out of the notices. After extensive hearings the Commission issued its report and recommendations on February 28, 1962, which found firemen unnecessary on freight trains, and which provided for the elimination of firemen in freight service and for procedures whereby the number of brakemen and switchmen could be reduced. The report is contained in an official publication by the U. S. Government Printing Office and was attached to the motion as plaintiffs' Exhibit 2. The Commission recommended that a new national agreement be perfected which would include the following provisions:

"1. After July 1, 1962, firemen-helpers need not be assigned to other than steam locomotives in freight and yard service, except as provided in paragraphs 4, 5, 6, and 9 below.

"2. After July 1, 1962, new firemen-helpers need not be hired to man road freight and yard diesels.

"3. Firemen-helpers and engineers shall be retired from active service in accordance with the provisions of the national retirement rules set forth in recommendation 4 of chapter 3."

The remainder of the recommendation deals with allowances in the form of protective measures for persons separated

from service. (Pp. 48-49, Exhibit 2.) Chapter 6, pp. 53-64, inclusive, deals with the subject of consist of crews other than engine service. At page 56 of Exhibit 2, the Commission stated:

"It is established that those few carriers which are not subject to crew consist rules and practices have crews somewhat smaller on the average than those carriers subject to such rules and practices. This suggests, although it does not conclusively prove, that the latter are to some extent subject to excess manning requirements. More persuasive is the fact that there are varying crew consists in road service on trains operated under similar conditions, as they pass from States having no 'full crew' laws into States having such laws. This is inferential evidence that the parties themselves consider that the difference in manpower requirements is not always warranted."

[fol. 287] Beginning on page 63 of the Exhibit, the Commission stated:

"It is obvious, of course, that the ability of the Carriers, whether acting unilaterally or otherwise, to effect changes in crew consist will be limited by applicable State crew consist laws or regulations, so long as such laws and regulations continue to exist. As noted above, more of the legislation of this kind was enacted prior to 1920. These laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that there will be difficulty in applying the rule recommended by us in States where 'full crew' laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge."

The report and recommendations of the Presidential Railroad Commission were accepted by the railroads but rejected by the Brotherhoods. Thereafter the Brotherhoods

requested mediation by the National Mediation Board pursuant to Section 5 of the Railway Labor Act, 45 U.S.C., Sec. 155, and on June 26, 1962, that Board pursuant to Section 5 of the Railway Labor Act, 45 U.S.C., Sec. 155, proffered arbitration of the dispute under Sections 7 and 8 of that Act. The railroads agreed to arbitration, but the Brotherhoods rejected the proffer, whereupon the National Mediation Board terminated its services. Litigation followed. *Brotherhood of Loc. Eng. v. B.&O. R. Co.*, 372 U.S. 284, 83 S.Ct. 691, 9 L.Ed.2d 759 (1963), in which the court at page 291 of 372 U.S., in disposing of the case, said:

"What is clear, rather, is that both parties, having exhausted all of the statutory procedures are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of Sec. 10 providing for the creation of an Emergency Board."

Section 10 of the Railway Labor Act, as amended, 45 U.S.C. 160, provides that if a dispute between a carrier and its employees is not settled under other provisions of the Act and such dispute should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in [fol. 288] his discretion, create a board to investigate and report respecting such dispute.

The President created such an emergency board which submitted its report and recommendations on May 13, 1963, which were accepted by the railroads and rejected by the Brotherhoods as a basis for settling the national labor dispute. Other efforts were made by the President but with no avail, and ultimately the President sent the Message, hereinbefore referred to, (Exhibit 1), to the Congress recommending legislation to impose a settlement on the parties and avoid a threatened national railway strike.

Upon receipt of the Message the Congress acted quickly and efficiently. Public Law 88-108 was enacted August 28, 1963, 77 Stat. 132, 45 U.S.C. Sec. 157 (1964 Supp.). Section 2 of the Act provided for the creation of an Arbitration Board, which was directed to decide the questions raised in the notices served by the railroads and Brotherhoods relating to the use of firemen and train consist crews and to make an award. Section 3 of the Act, inter alia, provides:

"The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, *shall resolve the matters on which the parties were not in agreement*, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration." (Emphasis added.)

Section 4 of the Act provided that the arbitration was to be conducted pursuant to the arbitration provisions of the Railway Labor Act to the extent that such was feasible, and "the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed * * *." The Arbitration Board, pursuant to the provisions of the statute, after extensive hearings and proceedings, issued its award on November

26, 1963. The award provided that subject to certain protective provisions for employees, 90 percent of the firemen positions (excluding passenger service) on railroads were to be abolished. This was predicated upon the Board's finding that such employees were unnecessary to the safe and efficient operation of freight and yard Diesel locomotives. The full findings of the Arbitration Board on this issue appear in full in subsection 7, pp. 27-28, of the opinion of the neutral members (Plaintiffs' Exhibit 4). As to the crew consist issue, the Board found that the consist of freight and yard crews had " * * * been determined generally by local rules, practices, state full crew laws, or regulations issued by public utility commissions." At page 45 of the opinion of the neutral members (Plaintiffs' Exhibit 4), the following statement appears:

"It has been explained earlier in this opinion that the size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

The award provided a binding arbitration procedure whereby the number of crew members to be used in road, freight and yard crews was to be fixed on a local basis. (See pp. 14-19 of the Award, Plaintiffs' Exhibit 4.) The

special boards of adjustment authorized in the Award to fix the size of such crews have convened and discharged that mandate on each of the plaintiff railroads, with the result that many switch crews have been fixed at less than three [fol. 290] helpers and many freight crews have been fixed at less than three brakemen.

The awards of the special boards of adjustment under and by virtue of the provisions of the Act to fix train and yard crew consists on the Missouri Pacific Railroad and the Texas and Pacific Railroad appear in Exhibit 5. The award respecting the northern, central and southern districts of Missouri Pacific Railroad Company is of utmost importance in this litigation since it covers the vast majority of the operation of the railroad in Arkansas. The award is as follows:

- "1. (a) All main line local freight trains will be operated with a minimum of two brakemen.
 - (b) All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c) The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
 - (d) The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.
- "2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helper shall be required on the following yard assignments:

Leavenworth Yard
Falls City Yard
Fort Scott Yard
Paragould Yard."

As provided by the Act, the Award of Arbitration Board No. 282 was filed in the United States District Court for the District of Columbia, and the Brotherhoods filed petitions in that court for its impeachment. Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co., and Brotherhood of Locomotive Engineers v. Union Pac. R., (D.C. 1964) 225 F.Supp. 11. Those two actions were brought to impeach and set aside an award of the special arbitration board created under the Act in order to avoid a threatened nationwide railroad strike which was then imminent. Judge Holtzoff, after thorough consideration of the contentions of the Brotherhoods, said at page 21:

[fol. 291] "In view of the foregoing considerations, the court reaches the conclusion that the award is valid. It is within the statutory authority of the board and is not subject to any infirmity. There remains for consideration the challenge to the constitutionality of the statute under which the board acted."

The court then discussed the question of the constitutionality of the Act, Public Law 88-108, and at page 23 said:

"The conclusion is inescapable that the standards as defined in the enabling Act are sufficiently adequate and definite. The statute is not vulnerable to any attack on the ground of unlawful delegation of power without proper standards. The statute is clearly constitutional as being within the power of the Congress. * * *

"In the light of the foregoing discussion, the award made by the arbitration board is valid; the Congress had power to order the arbitration; and, the board acted lawfully within the orbit of the authority delegated to it."

The case was appealed, and on February 20, 1964, the United States Court of Appeals for the District of Columbia, 331 F.2d 1020, in affirming the District Court, said at page 1022:

"We have given meticulous consideration to the parties' voluminous briefs and extensive oral arguments, and have concluded that the opinion of District Judge Holtzoff is a correct and adequate disposition of the issues presented. On the basis of his opinion, D.C., 225 F.Supp. 11 (1964), we affirm his judgment."

Certiorari was denied by the Supreme Court April 27, 1964, 337 U.S. 918, 84 S.Ct. 1181, 12 L.Ed.2d 187.

Prior to the decision in 225 F.Supp. 11, above referred to, the Brotherhoods applied for a temporary order to restrain the arbitration board from making any award that would name or affect the employees of a certain railroad. Division 700, Bro. of Loc. Eng. v. National Railway Labor Arbitration Board, (D.C. 1963) 223 F.Supp. 377. At page 378 Judge Holtzoff said:

"As was pointed out by counsel, the legislation here involved is somewhat unusual. No constitutional question, however, as to the validity of the legislation is being raised. * * * It is reasonable to assume, without deciding, that the Congress was invoking its power over interstate commerce and specifically over public utilities engaged in interstate commerce. Just as it has assumed power to regulate rates, through regulatory commissions, so it is now assuming power in this case to regulate working conditions, wages and similar matters through an Arbitration Board. An emergency may not create power, but it may give rise to an occasion to exercise a power that has been dormant or latent."

The application for a temporary restraining order was denied.

[fol. 292] The case of *In Re Certain Carriers*, (D.C. 1964) 229 F.Supp. 259, was a suit by certain railroad companies for an injunction to implement an award made by the Special Arbitration Board created by the Congress to determine certain major questions in dispute between the railroad companies and the organizations of their employees.

Specifically the railroad companies applied for a permanent injunction to restrain the representatives of the organizations of employees from calling, instigating or encouraging a strike or other stoppages in protest against applications of the award or any part of the award. The court set forth a brief history of the creation of the Arbitration Board, and at page 260 said:

"The award is final and binding on both sides and must be obeyed by all parties. Since the arbitration was conducted under the aegis of Congress, the award becomes part of the law of the land. It appears from the papers submitted in support of the present application that certain leaders of employees' organizations have made statements that are susceptible of a construction that they were threatening to call a strike and hence came this application."

Again, on page 261 of the opinion the court said:

"It has been said very often that this is the first time in the history of labor relations in this country that compulsory arbitration has been directed by the Congress. This is erroneous. True, this is the first time that such a course has been pursued on a nationwide scale, but compulsory arbitration has been in effect for years in labor relations of railroads in connection with minor disputes as they are called, that are being handled by the adjustment boards."

The court granted an injunction against calling any strikes as prayed by the moving parties.

This court has heretofore held that there is no genuine issue as to any material fact relevant to the questions raised by the allegations in paragraph 1 of the motion for summary judgment. However, the court is of the opinion that allegations numbers 2 and 3 of the motion are based upon controverted facts. Therefore, the questions which the court is entitled to consider are contained in paragraph 1 of the motion.

[fol. 293] In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, (1824), the great Chief Justice Marshall, in construing the Commerce Clause of the Constitution, Art. 1, Sec. 8, Clause 3, "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" at page 195 said:

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

In *Missouri Pac. R. Co. v. Porter*, 168 Ark. 22, 269 S.W. 47 (1925), the appellees brought a suit against the railroad to recover the value of 75 bales of cotton which were to be shipped from Earle, Arkansas, to Liverpool, England, on an export bill of lading. The cotton was destroyed by fire while on the cars of the railroad before its train left Earle, Arkansas. The railroad company interposed as a defense the provision in the bill of lading providing that "no carrier or party in possession of said property shall be liable for any loss thereof by causes beyond its control, or by floods, or by fire, or by riots, strikes, or stoppage of labor." The Supreme Court of Arkansas held that the provision in the bill of lading exempting the carrier from liability was void. The case went to the Supreme Court of the United

States by writ of error, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672 (1927), and in disposing of the question, the court at page 345 of 273 U.S. said:

"The general regulation of the 'issuance, form, and substance' of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the [fol. 294] means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." (Citing cases.)

In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945), the principal contention of the railroad was that the state statute contravened the Commerce Clause of the federal Constitution. Arizona had enacted what was commonly referred to as the Arizona Train Limit Law of May 16, 1912. Arizona Code Ann., 1939, Sec. 69-119, which made it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger or seventy freight cars. The court, in reversing the Supreme Court of Arizona, said at page 783 of 325 U.S.:

"Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail."

In consideration of the case, the court at page 769 of 325 U.S. said:

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible (citing cases), or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. (Citing cases)."

In *Atlantic Coast Line v. Georgia*, 234 U.S. 280, 34 S.Ct. 829, 58 L.Ed. 1312 (1914), the court at page 292 of 234 said:

"If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

[fol. 295] In *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182 (1912), the court at page 524 of 224 U.S. said:

"The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce." (Citing cases.)

No doubt Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate trains and establish, through proper agencies, such regulations as are necessary and proper for the protection of those engaged in interstate commerce. *Chicago, R.I. & P.R. v. Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290 (1911).

Federal legislation supersedes state law which, by its terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy. *McDermott v. Wisconsin*, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754 (1913); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 76 S.Ct. 559, 100 L.Ed. 941 (1956).

In *Cloverleaf Co. v. Patterson*, 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754 (1942), the court, beginning at page 154 of 315 U.S., said:

"This power of Congress to exercise exclusive control over operations in interstate commerce is not in dispute here. Nor is this power limited to situations where national uniformity is so essential that, lacking Congressional permission, all state action is inadmissible notwithstanding a complete absence of federal legislation. Exclusive federal regulation may arise, also, from the exercise of the power of Congress over interstate commerce where, in the absence of Congressional action, the states may themselves legislate. It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson v. Black-bird Creek Marsh Co.*, 2 Pet. 245; *California v. Thompson*, 313 U.S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.

[fol. 296] "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal

provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956), the court at page 501 of 350 U.S. said:

"Where, as in the instant case, Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate, different criteria have furnished touchstones for decision. Thus,

'(t)his Court, in considering the validity of state laws in the light of * * * federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.' *Hines v. Davidowitz*, 312 U.S. 52, 67."

Following the above quotation, the court referred to the case of *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231, and then proceeded, beginning on page 502, to apply several tests to the question of supersession. In the syllabus the tests applied are stated as follows:

"The Smith Act, as amended, 18 U.S.C. Sec. 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the *Pennsylvania Sedition Act*, which proscribes the same conduct. Pp. 498-510.

"1. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the States to supplement it. Pp. 502-504.

"2. The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. Pp. 504-505.

"3. Enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Pp. 505-510."

In *Terminal R. Asso. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943), the Railway Labor Act was held not to have pre-empted the field of regulating work conditions by state legislation. [fol. 297] The court stated that the state police power could demand that railroads in Illinois provide cabooses upon all runs within the state for the health, safety and comfort of the switchmen employees of the interstate railroads operating within Illinois. This opinion carefully considers the various interests involved, including the orderly administration of the Railway Labor Act and the possible burden upon interstate commerce and the state's legitimate interest in providing and protecting the health, safety and welfare of its citizens. This opinion at page 6 makes the following statement with respect to the Railway Labor Act as it existed January 18, 1943: "The Railway Labor Act like the National Labor Relations Act does not undertake government regulation of wages, hours or working conditions." This case and cases subsequently, construing the Railway Labor Act, are in agreement, however, that Congress has the power to pre-empt and occupy the field with respect to wages, hours and working conditions or any other facet of this industry which operates in interstate commerce as heretofore set out in *Southern Pacific v. Arizona*, *supra*, and *Missouri Pacific v. Porter*, *supra*.

It is readily apparent from *Southern Pacific v. Arizona*, *supra*; *Atlantic Coast Line v. Georgia*, *supra*; *Florida Lime & Avocado Growers v. Paul*, *supra*; and *Cloverleaf Co. v. Patterson*, *supra*; that the principal test in determining whether or not a state statute is pre-empted by federal leg-

islation or superseded by it is the actual or potential conflict. In the absence of a stated congressional intent in the federal act to specifically pre-empt state legislation, the question that must be determined is the extent of the conflict and whether the enforcement of the state law would substantially interfere with the regulations and rules promulgated under federal law. The *Pennsylvania v. Nelson* case, *supra*, in the portion of the court's opinion quoted above designates this conflict principle by the terms "occupying the field," "repugnance," "difference," "irreconcilability," "inconsistency," and "interference." Although [fol. 298] no particular constitutional yardstick provides the answer in every fact situation, the overriding consideration is always the same. A conflict of policy is as much an actual conflict as is conflicting provisions in the statutes themselves. This principle and the basis of it are elaborately discussed in *California v. Taylor*, 353 U.S. 553, 177 S.Ct. 1037, 1 L.Ed.2d 1034 (1957), where the question was "whether the Railway Labor Act of May 20, 1926, 44 Stat. 577, as amended, 45 U.S.C. Sec. 151 et. seq., applies to the State Belt Railroad, a common carrier owned and operated by the State of California and engaged in interstate commerce. For the reasons hereafter stated we hold that it does."

On September 1, 1962, The Board of State Harbor Commissioners entered into a collective bargaining agreement with the Brotherhood of Locomotive Firemen and Engineers and the Brotherhood of Railroad Trainmen as representatives of the Belt Railroad's operating employees. The agreement established procedures for promotions, layoffs and dismissals. It also fixed rates of pay and overtime. Those procedures and rates differed from their counterparts under the state civil service laws. The collective bargaining agreement conformed to the Railway Labor Act and was observed by the parties until January 1948. A successor to the Harbor Board instituted litigation in the state courts of California, in which it contended that the Railway Labor Act had no application to the Belt Railroad,

and that the wages and working conditions of the Railroad's employees were governed by the State's civil service laws rather than by the agreement. The Supreme Court of California agreed with the contention of the Harbor Board. Following this litigation, certain employees of the Belt Railroad commenced litigation in the Northern District of Illinois against ten members of the National Railroad Adjustment Board, First Division, and its executive secretary. The District Court dismissed the complaint, but on appeal the Court of Appeals of the Seventh Circuit, 233 F.2d 251 (1956), reversed the trial court. Certiorari was granted to [fol. 299] resolve the conflict between the United States Court of Appeals and the California Supreme Court as to the applicability of the Railway Labor Act to a railroad owned and operated by a state.

On page 559 of 353 U.S., the court said:

"On numerous occasions, this Court has recognized that the Railway Labor Act protects and promotes collective bargaining." (Citing cases.)

On page 561 the court said:

"Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232, involving Sec. 2, Eleventh, of the Railway Labor Act, which permits the negotiation of union-shop agreements notwithstanding any law of any State, we stated that 'A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State.'"

The State of California contended that doubts were created as to the congressional intent to make the Railway Labor Act applicable to state-owned railroads because in certain other federal statutes governing employer-employee relationships, Congress has expressly exempted employees of the United States or of a State. In reply to that contention the court at page 564 stated:

"We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees."

At page 566 the court further stated:

"The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclusion that Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State. The principal unions in the railroad industry are national in scope, and their officials are intimately acquainted with the problems, traditions and conditions of the railroad industry. Bargaining collectively with these officials has often taken on a national flavor, and agreements are uniformly negotiated for an entire railroad system. 'Breakdowns in collective bargaining will typically affect a region or the entire nation.' Lecht, *Experience under Railway Labor Legislation* (1955), 4. It is by no means unreasonable to assume that Congress, aware of these characteristics of labor [fol. 300] relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force."

When Congress does not expressly state that it intends to strike down particular state statutes, or does not manifest an overt intention to pre-empt state legislation, the constitutional question can be resolved only by an examination of the possibility of actual or apparent conflict in the implementation of the federal legislation. This principle is stated in *Southern Pacific Co. v. Arizona*, *supra*, at page 766 of 325 U.S., as follows:

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect health and safety of the public unless its purpose to do so is clearly manifested, citing cases, or unless the state law, in terms of its practical administration, conflicts with the act of Congress, or plainly and palpably infringes its policy. Citing cases."

Upon the initial examination of a federal and state statute which are alleged to be in conflict and it is determined that the federal statute expressly manifests the congressional intent to pre-empt or occupy the field, the question, of course, is resolved at that point. When the federal statute is silent, it cannot be said that the failure of Congress to state that it intends to pre-empt or occupy the field is conclusive that such intent does not exist. It seems almost axiomatic that Congress cannot anticipate all potential conflicts between the implementation of its policy as manifested by its legislation and that of the state and its policies manifested and implemented through its legislation. As a practical matter the only manner in which it can be determined whether or not federal legislation is in actual or apparent conflict with state legislation and thus, under the Supremacy Clause, occupying the field, is by actual examination of the subject matter and application to a particular set of facts. A classic example of this actual conflict between state and federal legislation when no manifested intent of Congress was [fol. 301] present that the state law be pre-empted or the

field occupied is presented in *Teamsters Union v. Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959), where

"We must decide whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied. * * * To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, * * *. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. Florida*, 325 U.S. 538, 542-544. Cf. *International Union v. O'Brien*, 339 U.S. 454, 457; *Amalgamated Assn. v. Wisconsin Employment Relations Board*, 340 U.S. 383; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-312. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms of an enactment of Congress. See *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232. Clearly it is immaterial

that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. ' * * * Congress has sufficiently expressed its purpose to * * * exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.' *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481. We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it."

The court reversed the Supreme Court of Ohio and the Court of Appeals of Ohio, Ninth Judicial District, 167 Ohio 299, 147 N.E.2d 856, and held that the state antitrust law may not be applied to prevent contracting parties from [fol. 302] carrying out their agreement upon a subject matter as to which the federal law directs them to bargain.

The case reached the Supreme Court again in 1960, 362 U.S. 605. Upon remand, the Court of Appeals of the State of Ohio, Ninth Judicial District, "set aside its previous order 'as it concerns and applies to Revel Oliver, appellee, as a lessor-driver' but continued the order in full force and effect 'as it concerns and applies to Revel Oliver, appellee, as a lessor-owner and employer of drivers of his equipment.'" The court in its per curiam opinion again stated that Ohio's antitrust law may not "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." The judgment was accordingly reversed.

It was not necessary in the *Teamster Union v. Oliver* case, *supra*, to hold that Congress by the enactment of fed-

eral statutes had occupied the field or pre-empted the Ohio statute because an examination of the statutes and their application to the particular facts reflected a clear, actual conflict between the implementation of the federal statutes and the enforcement of the state statute.

In the instant action, although the enabling legislation itself might be said to contain no language which manifests a congressional intent that the proposed Arbitration Board and the award made pursuant to the authority and direction of the statute pre-empted or occupied the field, the fundamental consideration is its implementation and its practical application in actual factual situations. As heretofore stated and emphasized in the quoted portions from the various Supreme Court opinions construing the Railway Labor Act, the question presented in the instant action is not resolved by a mere comparison of Public Law 88-108 and the state statutes, but by an examination of their practical application and the actual and apparent conflict be- [fol. 303] cause of the identity of subject matter which is dealt with by the state full-crew laws and this particular statute which became a part of Section 157 of the Railway Labor Act. 45 U.S.C. Sec. 157 (1965 Supp.).

The intervenors and defendants contend that the Act, Public Law 88-108, and the proceedings of Arbitration Board 282 reveal that the Congress did not intend to pre-empt the state full-crew statutes and that the Act is "temporary emergency legislation." Since these two contentions are closely related, they should be considered together.

In their brief the intervenors stated:

"Public Law 88-108 is, by its terms, temporary emergency legislation. Section 8 of the law specifically provides that the 'joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.' The last sentence of Section 4 permits the award of the board to remain in effect 'not to exceed two years from the date the award takes effect * * *.' The Board has declared that its Award will terminate

as of January 25, 1966, and with the termination there will be nothing left of it, the Board nor Public Law 88-108. The parties will then be free to resolve the Firemen and Crew Consist issues either through collective bargaining or unilateral action in other states—but in Arkansas they will still be under the operation of the Arkansas Full Crew Laws. Their private agreements in the form of regional awards from Special Boards of Adjustment will similarly expire. It is inconceivable that Congress intended that permanent state legislation of long-standing would be stricken by these temporary, private contractual restrictions on the parties.”

The defendants on their brief stated:

“The total concept of police power was founded as an essential ingredient to our federated system of government involving the several sovereign states. The proposition that a state can best diagnose and prescribe the cure of an evil has not yet been successfully assailed.

“The two year limitation of action is evidence of the fact that Public Law 88-108 was not to pre-empt this field of police power. The comments of plaintiffs on this matter deserve consideration. It is difficult to confirm a true legal basis for plaintiffs’ argument particularly in view of the proposition that if the full crew laws were pre-empted, they would be revived at the conclusion of the life of the pre-empting authority. 1 Sutherland Statutory Construction, Sec. 2027.

“The power to enact laws under the police power is an important sovereign attribute. This extensive authority is vested in the General Assembly. It is vital machinery to the State. It should not be removed on such anemic evidence and in such a perfunctory manner.”

[fol. 304] The court has heretofore set forth that part of Section 3 of the Act which outlines the work that the Arbitration Board created by the Act shall perform, and

directs that Board to dispose of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews," and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist," and implementing proposals pertaining thereto. The last sentence of the section provides:

"Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration."

The "Whereas" provisions of the Act, inter alia, provide:

"Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

"Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute;

"Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

"Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

"Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

"Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to

the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement;"

In the Message of the President to the Congress, House Document 142, the President outlined some of the proceedings that had been taken in an effort to avoid the necessity of enacting Public Law 88-108. He said:

[fol. 305] "Ineffective measures which would not halt an injurious nationwide rail strike have been rejected as inconsistent with the public interest.

"Punitive antilabor measures which would destroy railway labor's rights to collective bargaining and reasonable job security have been rejected as harmful to the Nation and insensitive to the very real issues posed by the proposed work rule changes.

"Seizure of the railroads has been rejected as unjustified in the circumstances of this case, as creating complex legal and financial problems for the Government, and as merely postponing the day of reckoning on more efficient work rules and their acceptance by the brotherhoods.

"Compulsory arbitration of this dispute by a special or congressional panel has been rejected as inconsistent with the principle that solutions reached through free collective bargaining should always be permitted and preferred.

"Indefinite extension of the status quo for one or both parties has been rejected as an evasion of a serious public as well as labor-management issue that must be squarely faced.

"Our objective instead was to find a solution which—

"(1) Is sufficiently familiar to the Congress, in terms of the procedures and principles involved, to facilitate its prompt enactment;

"(2) Encourages the parties to achieve their own solutions through collective bargaining;

"(3) Confronts the parties, on issues where voluntary agreement is not possible, with methods and standards of solution which are comparable to those both sides have previously experienced and found acceptable;

"(4) Recognizes both the public interest in promoting railroad efficiency and preventing a disastrous strike and the public's concern for those adversely affected by a settlement; and

"(5) Provides for an interim remedy while awaiting the results of further bargaining by the parties."

In support of their contentions that the Congress did not intend to pre-empt the state full-crew statutes by the enactment of Public Law 88-108, the intervenors and defendants refer to portions of the hearings before the House Committee and also before the Senate Committee and some of the statements made on the floor of the House of Representatives and of the Senate while the bill was under consideration. During the hearings on the bill before both the House and Senate Committees, its possible effect on state crew consist laws was discussed, but the question under [fol. 306] discussion was primarily with reference to a joint resolution that was submitted by the President, which assigned to the Interstate Commerce Commission essentially the same responsibility that was delegated to the arbitration board that was ultimately enacted as Public Law 88-108. Both branches of the Congress clearly understood that the bill did not contain a provision which would prevent pre-emption of the state crew consist laws, and in fact when the question was under consideration, it was suggested that if they did not intend to pre-empt the state crew consist laws that an expression of intent to preserve such state law should be included in the bill. A complete review of the legislative history will reveal that some members of Con-

gress thought that the legislation would pre-empt state crew consist laws, and others thought it would not. It is perfectly clear that the Committees in both Houses had it brought effectively to their attention that the legislation might have a pre-empting effect, and if such pre-emption was not the desire and intention of the Congress, it should so expressly state in the bill. There was no such expression although the bill was amended in many other respects after the hearings before both Committees had been concluded.

If any rational conclusion can be drawn from a legislative history on the question as to whether it intended to pre-empt the state full crew consist laws, it is that the Congress intentionally elected not to include a saving provision for such laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis. There is nothing in the Act itself or in the history that indicates that the Congress intended to resolve this problem of national magnitude by legislation that would be effective in only some 30 states that do not regulate crew consists by law or administrative regulation. It is a generally accepted principle of statutory construction that Congress normally intends that federal law shall operate uniformly throughout the Nation in order that the federal program will remain unimpaired. [fol. 307] In *Jerome v. United States*, 318 U.S. 101, 63 S.Ct. 483, 87 L.Ed. 640 (1943), the court at page 104 of 318 U.S. said:

"But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States v. Pelzer*, 312 U.S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control."

The language of the Act, Public Law 88-108, and of the Award is plain and unambiguous, and courts should not resort to legislative history when the language of the statute

is clear. In *Ex Parte Collett*, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949), the court at page 61 of 337 U.S. said:

"Third. Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Sec. 1404(a) but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

In *Packard Co. v. Labor Board*, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947), the court at page 492 of 330 U.S. said:

"We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

As heretofore stated, the issue of pre-emption by Public Law 88-108 and the award made thereunder cannot be resolved by simply comparing the provisions of the act itself and the state statutes in question. The identity of the subject matter itself demonstrates apparent conflict.⁵ Added to this is the actual conflict presented

⁵ The Arbitration Board instructed the Special Boards of Adjustment to use the following guidelines in reaching their decisions:

"C(1). The special board of adjustment in making its decision shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

(Footnote 5 continued)

by the application and implementation of the state and federal statutes which attempt to govern the same conduct. Actual conflict is demonstrated by the very fact that none of the parties can comply with both the state law and

[fol. 308]

"C(2). General Considerations.

- (a) Assurance of adequate safety.
- (b) Avoidance of unreasonable burden or workload on members of the crew.
- (c) Changes in operating conditions, including density of traffic.
- (d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
- (e) Special conditions which exist on any particular assignment.
- (f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
- (g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
- (h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
- (i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
- (j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
- (k) The presence or absence of a fireman in the engine service crew."

In addition, the Act itself in Section 3 specifically recites the substantive matters to be considered by the Arbitration Board, which substantially is the same thing regulated by the state full crew laws:

"The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of Novem-

the Arbitration Award. This fact in itself demonstrates that there is no merit whatever to the argument that Congress has not occupied the field with respect to the fireman issue and the crew consist issue. The Southern Pacific v. Arizona case, supra; California v. Taylor case, supra; and Teamsters Union v. Oliver case, supra, establish that the overriding consideration in determining whether or

ber 2, 1959; identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' * * *."

The award of the Board of Adjustment for the northern, central and southern districts of the Missouri Pacific Railroad Company has heretofore been set forth, and it can readily be seen that provision 1(a) is concerned with exactly the same subject matter as the state full crew law which also prescribes the number of brakemen. Section 1(b) deals with the same identical subject matter as the state full crew law which regulates the number of brakemen. Section 2 deals with the same identical subject matter as regulated by the state full crew law which attempts to establish the crew consist.

[fol. 309] The local Adjustment Award for the Gulf District of Missouri Pacific Railroad provides at pages 8 and 9:

- "1. (a) All main line local freight trains will be operated with a minimum of two brakemen.
 - (b) All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c) The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
 - (d) The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.
- "2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service."

It is apparent that provisions 1(a), 1(b) and (2) deal with exactly the identical subject matter which is regulated by the state full crew law. The local Adjustment Award for the Texas and Pacific Railroad Company contains identical provisions to the awards for the Missouri Pacific quoted above.

not a particular provision under the Railway Labor Act, or any other federal legislation, may be said to occupy the field or to pre-empt the state legislation is the actual conflict arising in administering and implementing the congressional policy as reflected by the federal statute. In these three cases it can readily be seen that actual conflict exists by virtue of the inability of the parties to comply with [fol. 310] both the state and federal acts. The various constitutional tests used to determine whether or not congressional legislation can be said to pre-empt or occupy the field when no manifested intent to do such is contained in the statutes themselves are determined by the actual conflict between the state and federal acts. These various constitutional guidelines do no more than state that under the Supremacy Clause that when a conflict (either in wording of the statutes or in their application) exists between a state and federal act, the state act must yield to the federal act by virtue of the Supremacy Clause. This same rationale, when applied to the commerce provisions of the Constitution is often expressed in terms of burden upon or affecting interstate commerce. Again, the overriding consideration in applying that constitutional test is conflict between the state and federal acts, or the implementation of the federal act and its frustration by virtue of the state act. Conflict is not limited to an examination of the provisions of the statutes themselves. In a primary sense that is where the examination to determine the actual or possible conflict begins. But this initial determination is no more than the first step in determining if the conflict exists. It has been demonstrated in the instant case that under the particular facts the parties cannot comply with the award made thereunder. It was stated in *In Re Certain Carriers*, supra, that where the proceeding under which the award was made "was conducted under the aegis of Congress, the award becomes part of the law of the land."

In *Florida Lime & Avocado Growers v. Paul*, supra, the court at page 142 of 373 U.S. stated:

"A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design

where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." (Citing cases.)

The Arbitration Board created by the Act was specifically directed "to resolve the matters on which the parties are not in agreement." This is precisely what the Board did. It was not intended that the Board of Arbitration created by the Act should continue in existence as a permanent arbitration board.

[fol. 311] Sections 6 and 7 of the Act provide:

"Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement."

"Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

Section III of the General Award, entitled "Consist of Road and Yard Crews (Other Than Engine Service)", provided that the issue of crew consists shall be remanded to the local properties for negotiation. Beginning on page 15 of Exhibit 4, the review procedures were set forth, which provided:

"B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment."

Then follows provisions relative to the election of the members of the special boards of adjustment. On page 16 of Exhibit 4 the board said:

"B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement."

The guidelines referred to appear on pages 17-19, inclusive, of Exhibit A, a portion of which is set forth in footnote 5.

The award of Arbitration Board 282 provided that changes in the scope or application of rules which required a stipulated number of trainmen in road service or brakemen in yard service can only be accomplished by agreement or in accordance with procedures provided therein. [fol. 312] The court has heretofore referred to and set forth the award made by Arbitration Board 282 and by the special board of adjustment established under Arbitration Board 282 dated May 6, 1964. Plaintiffs' Exhibit 5 contains the proceedings and award made by the special board of adjustment established under Arbitration Board 282 between the Missouri Pacific Railroad (Northern, Central and Southern Districts) and also the Gulf District of the Missouri Pacific, and the Texas & Pacific Railroad and subsidiary lines with the Brotherhood of Railroad Trainmen.

When the uncontroverted facts as reflected by the record before the court are considered, the court is convinced that the purpose and intent of Congress in enacting Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the awards, which would occur on May 6, 1966. Section 4 of the Act provides that the award shall continue in force not to exceed two years from the date the award takes effect unless the parties agree otherwise. Without doubt, it was contemplated and provided that any changes made thereafter in crew consists would be governed by collective bargaining conducted pursuant to the procedure prescribed by the Railway Labor Act. That Act protects and promotes collective bargaining, *California v. Taylor*, supra, and supersedes state laws that restricted the collective bargaining rights that were granted and recognized by the Railway Labor Act. In the light of the decisions previously discussed herein setting forth the area of regulation denied the states and vested in the bargaining parties, Congress by the enactment of Public Law 88-108, intended to protect collective bargaining, but when the parties were unable to resolve their dispute by collective bargaining, there was little doubt in the mind of Congress that the number of employees to be assigned to a task, fundamental as that question is in the matter of working conditions, is an issue that should be resolved by arbitration under and in accordance with the provisions of the Railway Labor Act.

[fol. 313] Not the least of the court's consideration is the substantial public interest involved relative to the uninterrupted and orderly flow of goods in interstate commerce as well as the necessity for an efficient and orderly railway transportation system as a part of the national defense effort. (See Letter Advisory Opinion from General Counsel of the Department of Defense Joint Resolution Committee, U. S. Code Cong. and Adm. News, 1963, p. 842, which states that any interruption in rail service would severely impair the defense effort.)

The essential nature of the orderly flow of rail transportation for goods and services is succinctly stated in

Virginia Ry. v. Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1936), in which the court at page 553 of 300 U.S. stated:

"The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. *Wilson v. New*, 243 U.S. 332, 347-348. The Railway Labor Act, Sec. 2, declares that its purposes, among others, are 'To avoid any interruption to commerce or to the operation of any carrier engaged therein,' and 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.' The provisions of the Act and its history, to which reference has been made, establish that such are its purposes, and that the latter is in aid of the former. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here."

This opinion, in recognizing the substantial national interest involved in the settlement of railway disputes, made the following statement which seems particularly applicable in the instant controversy at page 552 of 300 U.S.:

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the

ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

It would unduly extend this opinion to discuss the multiple conflicts between the crew consist laws of Arkansas and the unambiguous national policy evidenced by Public Law 88-108 and the Railway Labor Board, which protects collective bargaining to the exclusion of state regulation or state crew consist laws in direct conflict with the federal legislation and expressed policy. The attacked statutes constitute an obstacle to the accomplishment of the federal aims and purposes and frustrates the national scheme of regulation, and must be deemed superseded by the federal legislation.

The actual conflict that exists, as heretofore stated, is apparent by virtue of the inability of the parties to comply with both the state statutes and the federal act and the arbitration award made pursuant thereto. This actual conflict, together with the Supremacy Clause of the federal Constitution, thus renders the state statutes unenforceable whether the federal legislation be said to pre-empt or occupy the field.

The arbitration was conducted, as required by Section 4 of Public Law 88-108, pursuant to Sections 7 and 8 of the Railway Labor Act. In *Int'l Asso. of Machinists v. Central Airlines*, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963), at page 687 of 372 U.S. the court said:

"Congress has long concerned itself with minimizing interruptions in the Nation's transportation services by strikes and labor disputes and has made successive attempts to establish effective machinery to

resolve disputes not only as to wages, hours and working conditions, the so-called major disputes connected with a negotiation of contracts or alterations in them, but also as to interpretation and application of existing contracts, the minor disputes of the type involved in this case."

[fol. 315] The Supreme Court has many times reviewed the history of the railway labor laws.*

In *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), the court, in speaking of the so-called minor disputes, at page 727 of 325 U.S. said:

"The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them. Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation. Sec. 3 First (i). Rights of notice, hearing, and participation or representation are given. Sec. 3 First (j). In some instances judicial review and enforcement of awards are expressly provided or are contemplated. Sec. 3 First (p); cf. Sec. 3 First (m). When this is not done, the Act purports to make the Board's decisions 'final and binding.' Sec. 3 First (m)."

In Section 3 of Public Law 88-108 it is provided that the award made by the Arbitration Board "shall be binding on both the carrier and organization parties to the dispute and

* *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945); *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795 (1950); *Brotherhood of Trainmen v. Chicago, R. & I. R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *Union Pacific R. Co. v. Price*, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959); *Int'l Asso. of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961).

shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration."

Act 116 of 1907 boldly provides that no railroad company operating any line or lines of railroad in this state and engaged in the transportation of freight over its lines "shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes * * *."

The President in his Message, Plaintiffs' Exhibit 1, at page 9 stated:

"The Presidential Commission was established in part, it said, because of the need to close the gap between technology and work."

[fol. 316] In the concluding paragraph on page 10 the President said:

"Thus the prompt enactment of this measure by the Congress will help launch a new national effort to meet the growing challenge of worker displacement by technological and economic change. Both the proposed bill and the new Commission are actions that will benefit both labor and management—but above all, they will benefit the public interest, and that is our primary test."

It must be borne in mind that in the award of Arbitration Board 282 the special boards of adjustment were specifically directed to follow certain guidelines in the consideration and resolution of questions submitted to them. The boards were required, in making the awards, to consider the safety of the employees, the work load, changes in operating conditions, and all other local factors in order that the problems might be resolved as nearly as possible on a uniform national basis.

The Congress was confronted with the broader aspects of the problem and we cannot believe that the Congress

intended a hiatus in the procedure provided by Public Law 88-108 and the Railway Labor Act. The Congress intended to provide a means for the settlement of major disputes in the same manner that it had provided for the settlement of minor disputes and to enact a statutory scheme to be legally enforceable in the courts for the resolution of all work rules disputes arising from the operation of trains in interstate commerce whether heretofore classified as major or minor. The court does not understand that the intervenors and defendants are contending that the Arbitration Awards made as a result of the enactment of Public Law 88-108 are not valid and enforceable for at least a period of two years, or until May 6, 1966, but we cannot believe that the Congress intended to allow a return of the confusion and chaos that impelled it to act, and if the contentions of the intervenors and defendants are sustained, then the entire Nation will be confronted again with precisely the situation that existed prior to the enactment of Public Law 88-108.

[fol. 317] Therefore, plaintiffs' motion for summary judgment should be sustained, and an order is being entered today sustaining the motion and adjudging that Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913 of the General Assembly of Arkansas are in substantial conflict with Public Law 88-108, enacted August 28, 1963, 77 Stat. 132, 45 U.S. Sec. 157 (1964 Supp.), and the proceedings thereunder, and are therefore unenforceable against the plaintiffs; that the defendants, and their successors in office, and all persons acting under their direction and in concert with them, are enjoined and restrained from enforcing, or attempting to enforce, Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913, and from advising instituting, prosecuting, or aiding in any action, suit, or proceeding of any kind or character to recover from, or impose upon, or enforce against plaintiffs, their officers, agents or employees, or any of them, any penalty or damage for failure or refusal to obey, observe or comply with the provisions of said Acts or either of them, and from interfering with, or attempting to interfere with, or from advising, institut-

ing, prosecuting, or aiding in any action, suit, or proceedings to interfere with, restrain or prevent plaintiffs, their officers, agents, or employees, or any of them, from operating trains, engines and employing switch crews within the State of Arkansas without complying with said Acts.

The order will further provide that the parties hereto shall pay their own costs.

This 5 day of March, 1965.

Jno. E. Miller, United States District Judge,
J. Smith Henley, United States District Judge.

[fol. 318]

VAN OOSTERHOUT, Circuit Judge, dissenting.

The pleadings, the issues and the background material relating to this case are well stated in Judge Miller's opinion. All of us appear to be in agreement that the summary judgment cannot be granted upon two or three of the motion for summary judgment because of the existence of a dispute as to relevant material facts. I am inclined to agree that no genuine issue as to material facts exists with respect to ground one of the motion based upon preemption.

I have no doubt whatever that the federal government can, if it chooses, by appropriate legislation preempt the field covered by the Arkansas statutes here under attack. My difficulty is that I cannot find any reasonable basis for saying that Congress has taken such action. The majority, in support of preemption, relies principally upon Public Law 88-108 discussed in the majority opinion. If it be assumed that the collective bargaining notices served by the parties became a part of the act providing for arbitration, I find nothing in the notices specifically proposing the abrogation of state crew consist statutes. Such statutes in my view do not fall within the notice provision for a rule to provide that "all agreements, rules, regulations, interpretations, and practices, however established, which conflict with the provisions of paragraph 1 of this rule shall be eliminated." In my view, parties cannot by agreement abrogate valid state safety statutes. The state of Arkansas has a legitimate interest in its health and safety laws.

While Public Law 88-108 contemplates that the arbitrators follow collective bargaining procedures as closely as possible and that an award shall be binding upon the parties [fol. 319] ties, it is difficult to glean any Congressional intention that the arbitrators were given power to abrogate state safety laws.

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, the Supreme Court states:

"The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. See, e.g. *Huron Portland Cement Co. v. Detroit*, *supra*."

Thus contrary to the view of my brothers, I can find nothing in Public Law 88-108 or the arbitration award which manifests a Congressional intent to preempt the field covered by the Arkansas statutes.

I cannot agree that the legislative history if it is relevant helps the plaintiffs' position. At most it shows a controversy among members of Congress as to whether state safety regulations will be preempted by the law. I believe the majority's reliance upon the fact that the bill did not contain a disclaimer of an intent to preempt rests upon a weak foundation. I think it is more significant that there is no express or fairly implied statement of any attempt to preempt.

The Arkansas statutes which we are here considering have been before the Supreme Court on three prior occasions, as set out in the majority opinion, and they have been

[fol. 320] branded as measures for the protection of public safety. In *Missouri Pacific R.R. v. Norwood*, 283 U.S. 249, 252, the Court in holding the Arkansas statutes valid, states: "Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others." And at p. 256, in responding to a query as to whether Congress has preempted the field, answers, "In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews."

The Supreme Court on numerous occasions has recognized the favorable position of state laws designed to protect safety. *Teamsters v. Oliver*, 358 U.S. 283, 297; *Terminal R.R. Ass'n v. Brotherhood*, 318 U.S. 1; *Reid v. Colorado*, 187 U.S. 137.

Oliver did not involve a safety regulation but a conflict between federal labor law and a state antitrust law. The Court observes, "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." 358 U.S. 283, 297.

California v. Taylor, 353 U.S. 553, heavily relied upon by the majority, is clearly distinguishable. There the conflicting statute was a state civil service statute which prohibited collective bargaining and such a statute, of course, would obviously defeat the purpose of the federal Railway Labor Act. At footnote 8, p. 560, *Terminal R.R. [fol. 321] Ass'n v. Brotherhood*, *supra*, is cited and the observation is made that such case did not concern a conflict between federally protected collective bargaining and inconsistent state laws.

I recognize that my conclusion that Congress did not expressly preempt the field does not settle the matter. In *Local 20 v. Morton*, 377 U.S. 252, 258, the matter of the test to be applied when Congress has not expressly preempted the field is thus stated:

"The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102. The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation."

In the Florida Lime & Avocado Growers case, *supra*, the Court in applying the foregoing test found that while the California standards were more restrictive than the federal standards, there was no inevitable collision between the two schemes of regulation, despite of the dissimilarity of the standards. At p. 146 of 373 U.S., the Court says that "while it is conceded that the California statute is not a health measure, neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers."

Similarly here, it is possible for the plaintiff railroad to comply with the state law without violating federal law or the arbitration award. The award provides only for the minimum consist crews; there is no maximum fixed.

While it would be inconvenient and burdensome for the railroad to comply with the state safety laws, it is possible [fol. 322] for them to comply with both the arbitration award and the state law. The arbitration board apparently did not consider the state statute preempted as in dealing with the firemen issue, the Board at p. 35 of its opinion mentions the laws of states requiring a fireman as a reason why individual carriers will not immediately stop assigning firemen on many freight engine crews. There is language in the Board's findings and in the findings of the Presidential Commission indicating that the question of the validity of crew consist laws is beyond the scope of the problem assigned to them.

I recognize that a strong case can be made for preemption in the situation here presented. Possibly it might have

been wiser for Congress to have specifically preempted the field. However, such is a matter for Congressional determination, not judicial determination.

In my view, the real issue is the conflict between the operation of the federal statutes regulating interstate commerce and the Railway Labor Act and the state statutes under attack. It is quite true that courts at the present time take a more liberal view on the preemption issue than was held thirty or more years ago when the cases dealing with the precise Arkansas statutes here involved were decided. If this were a case of first impression, I might be persuaded to join in the majority opinion. It is possible that the Supreme Court as presently constituted might take a different view on the preemption problem presented in the earlier Arkansas cases. However, if any change is to be made in the application of preemption here, it should be made by the Supreme Court, not this court. The prior specific findings in the earlier cases, that the Interstate [fol. 323] Commerce Act and the Railway Labor Act did not preempt the field covered by the Arkansas safety statutes, and the favored position given by the Supreme Court to state safety statutes, restrain me from holding that federal preemption here exists.

In ruling upon this motion, we do not reach the issue of whether the safety standards imposed by the Arkansas statutes are reasonable in the light of present conditions.

I would with some reluctance deny the motion for summary judgment on the preemption issue.

Martin D. Van Oosterhout, United States Circuit Judge.

[fol. 324]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, successor in office to LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, Intervenor.

JUDGMENT—March 8, 1965

On this 8th day of March, 1965, the above entitled cause having been submitted to the Three-Judge Court, composed of Circuit Judge Martin D. Van Oosterhout and District Judges Jno. E. Miller and J. Smith Henley, upon the plaintiffs' motion for summary judgment, and having considered said motion and the briefs of the parties in support of their respective contentions, and all other matters herein, the opinion of the majority and the dissenting opinion having heretofore been filed, and in accordance with the opinion of the majority,

It Is Ordered and Adjudged that the plaintiffs' motion for summary judgment be and the same hereby is sustained; that Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913 of the General Assembly of Arkansas are in substantial conflict with Public Law 88-108, enacted August 28, 1963, 77 Stat. 132, 45 U.S. Sec. 157 (1964 Supp.), and the proceedings thereunder, and are therefore unenforceable against the plaintiffs; that the defendants, and their successors in office, and all persons acting under their direction and in concert with them, are hereby enjoined and restrained from enforcing, or attempting to enforce, Act 116 of the [fol. 325] Acts of 1907 and Act 67 of the Acts of 1913, and from advising instituting, prosecuting, or aiding in any action, suit, or proceeding of any kind or character to recover from, or impose upon, or enforce against plaintiffs, their officers, agents or employees, or any of them, any penalty or damage for failure or refusal to obey, observe or comply with the provisions of said Acts or either of them, and from interfering with, or attempting to interfere with, or from advising, instituting, prosecuting, or aiding in any action, suit, or proceedings to interfere with, restrain or prevent plaintiffs, their officers, agents, or employees, or any of them, from operating trains, engines and employing switch crews within the State of Arkansas without complying with said Acts.

It Is Further Ordered and Adjudged that the parties hereto pay their own costs of this action.

Jno. E. Miller, United States District Judge, J. Smith
Henley, United States District Judge.

[File endorsement omitted]

[fol. 326]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, successor in office to LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, Intervenor.

ORDER DENYING INTERVENORS' MOTION TO SUSPEND
INJUNCTION PENDING APPEAL—March 15, 1965

On this 15 day of March, 1965, the court, having considered the motion of the intervenors filed herein on March 8, 1965, for an order suspending the injunction against the defendants and others pending hearing and determination of the appeal of the intervenors to the Supreme Court of the United States from the order or decree of this court entered herein on March 8, 1965, is of the opinion that the same should be denied.

It Is, Therefore, Ordered and Adjudged that the motion of intervenors be and is denied.

Martin D. Van Oosterhout, United States Circuit Judge; Jno. E. Miller, United States District Judge; J. Smith Henley, United States District Judge.

[File endorsement omitted]

[fol. 327]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, successor in office to LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, Intervenors.

NOTICE OF APPEAL OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO THE SUPREME COURT OF THE UNITED STATES
—Filed March 17, 1965

1. Notice is hereby given that Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, Order of Railway Conductors and Brakemen, and Switchmen's Union of North America, the Intervenor above named, appeal to the Supreme Court of the United States from the final judgment granting Plaintiffs' Motion for Summary Judgment and enjoining the enforcement of Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913 of the General Assembly of Arkansas, entered in this action on March 8, 1965. This appeal is taken pursuant to 28 U.S.C. § 1253.

[File endorsement omitted]

[fol. 328] 2. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

- A. Complaint with Exhibits A and B thereto attached;
- B. Order granting Intervenor leave to intervene;
- C. Intervenor's Motion to Dismiss for failure to state a claim (without brief);
- D. Defendants' Answer to Complaint;
- E. Intervenor's Motion to Dismiss for Want of Statutory Jurisdiction for a Three-Judge Federal Court Under 28 U.S.C. § 2281 (without brief);
- F. Intervenor's Motion for order setting consolidated oral argument on Motions to Dismiss;
- G. Order overruling Motion for order setting consolidated oral argument on Motions to Dismiss;
- H. Order denying Motion to Dismiss for failure to state a claim;
- I. Order denying Motion to Dismiss for Want of Statutory Jurisdiction for a Three-Judge Federal Court Under 28 U.S.C. § 2281;

J. Intervenor's Answer;

K. Plaintiffs' Motion for Summary Judgment with Exhibits 1 through 14 filed therewith (without brief);

L. Defendants' Response to Motion for Summary Judgment (without brief);

M. Majority Opinion granting Plaintiffs' Motion for Summary Judgment and Dissenting Opinion thereto;

[fol. 329]

N. Judgment granting Plaintiffs' Motion for Summary Judgment;

O. Intervenor's Motion to Suspend Injunction Pending Appeal; and

P. Order (or Judgment) denying Intervenor's Motion to Suspend Injunction Pending Appeal.

3. The following question is presented by this appeal: "Has the United States Congress, under the Supremacy Clause of the United States Constitution, enacted legislation which deprives the State of Arkansas of power to enforce its Act 116 of 1907 and Act 67 of 1913, Arkansas Statutes Annotated §§ 73-720 through 722, 73-726 through 729 (Repl. Vol. 1957)?"

McMath, Leatherman, Woods & Youngdahl, By
James E. Youngdahl, Attorneys for the Inter-
venors, 1330 Tower Building, Little Rock, Ar-
kansas 72201

[fol. 330] Proof of Service (omitted in printing).

[fol. 332]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,

v. Civil Action No. 944

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, successor in office to LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, Intervenor.

CROSS-DESIGNATION OF RECORD—Filed March 25, 1965

To: Mr. Truss Russell, Clerk, United States District Court For The Western District of Arkansas.

In preparing the transcript of Record in the above-entitled cause on the appeal of intervenors and defendants, heretofore taken by each of them, please include in the transcript:

1. Intervenor's Motion To Intervene.
2. Intervenor's Motion For An Extension of Time to Plead.

3. Response of Plaintiffs to Motion For Leave To Intervene.
4. Order granting intervenors' sixty-day extension of time in which to plead.
5. Intervenors' Motion for an Extension of Time to respond to Motion For Summary Judgment.
6. Plaintiffs' Statement in Opposition to Intervenors' Motion for an extension of time.
7. Order granting extension of time to intervenors and defendants in which to respond to Motion For Summary Judgment.

[File endorsement omitted]

[fol. 333]

8. Joint Motion for Substitution of Party Defendant.
9. Order substituting Party Defendant.

On Behalf of All Attorneys Signing the Complaint
Herein, Robert V. Light, 1100 Boyle Building,
Little Rock, Arkansas, Attorney for Plaintiffs.

Certificate of Service (omitted in printing).

[fol. 334]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE
KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI
PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, and THE TEXAS AND PACIFIC RAILWAY COM-
PANY, Plaintiffs,

v. Civil Action No. 944

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, successor in office to
LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting
Attorney for the Eighth Judicial Circuit of Arkansas,
Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF
RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Intervenors.

DEFENDANTS' NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES—Filed April 1, 1965

Come the defendants by their attorney, Bruce Bennett,
Attorney General of the State of Arkansas, by Jack L.
Lessenberry, Assistant Attorney General, and state:

1. Pursuant to Rule 10 of the Supreme Court of the
United States, notice is hereby given that Robert N. Hardin,
Prosecuting Attorney for the Seventh Judicial Circuit of
Arkansas, successor in office to Lawson E. Glover, and John

W. Goodson, Prosecuting Attorney for the Eighth Judicial [fol. 335] Circuit of Arkansas, defendants in this cause, appeal to the Supreme Court of the United States the judgment on a Motion for Summary Judgment submitted by plaintiffs which has enjoined defendants from enforcement and prosecution of acts prohibited by Act 116, Acts of Arkansas of 1917 and Act 67, Acts of Arkansas of 1913. This final judgment was entered in this Court on March 8, 1965. This appeal is taken under the provisions of Title 28, United States Code § 1253.

2. The defendants adopt and incorporate herein the request of intervenors and the cross designation of plaintiffs of the record to be prepared by the Clerk of this Court as a transcript of the record for transmission to the Clerk of the Supreme Court of the United States.

3. These questions are presented for this appeal:

I

"Whether an actual conflict or inconsistency exists between the Arkansas Acts in controversy, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which requires and has resulted in arbitration of labor disputes of Railroad Management and the Brotherhood?"

II

"Has the Congress of the United States intended to deprive the State of Arkansas of its authority to legislate matters of safety by establishing minimum railroad crews in certain prescribed circumstances or did the Congress of the United States by enactment of Public Law 88-108 pre-empt the State of Arkansas and responsible State officials from enforcing Act 116, Acts of Arkansas of 1917, and Act 67, Acts of Arkansas of 1913?"

[fol. 336]

III

"If Public Law 88-108 nullifies conflicting Arkansas Statutes or merely suspends and prohibits the enforcement of

those Statutes for the duration of the national arbitration and awards pursuant to Public Law 88-1081”

Bruce Bennett, Attorney General, Jack L. Lessenberry, Assistant Attorney General, Attorneys for Defendants, Justice Building, Little Rock, Arkansas.

[fol. 337] Proof of Service (omitted in printing).

[fol. 339] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 340]

SUPREME COURT OF THE UNITED STATES

No. —October Term, 1964

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA (Appellants and Intervenors),

and

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, successor in office to LAWSON E. GLOVER, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, Appellants,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY.

ORDER STAYING INJUNCTION—March 27, 1965

Upon Consideration of the application of intervening appellants, and of the opposition of the appellees thereto,

It Is Ordered that the injunction of the United States District Court for the Western District of Arkansas of March 5, 1965, be, and the same is hereby, stayed pending the action of this Court upon the jurisdictional aspect of the case. Should the appeal be dismissed or the judgment summarily affirmed, this stay is to expire immediately. In the event the Court notes probable jurisdiction or postpones further consideration of the question of jurisdiction to the hearing of the case on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court.

This stay is conditioned upon the filing of the record and the jurisdictional statements by the appellant unions and the State of Arkansas on or before April 15, 1965, and of the filing of any reply or replies to such motions as may be filed pursuant to Rule 16 within ten days after the filing of such motions.

Byron R. White, Associate Justice of the Supreme Court of the United States.

Dated this 27 day of March, 1965.

[fol. 341]

SUPREME COURT OF THE UNITED STATES

Nos. 1054 & 1070—October Term, 1964

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al., Appellants,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al.;

and

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, etc., et al., Appellants,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al.

Appeals from the United States District Court for the
Western District of Arkansas.

ORDER NOTING PROBABLE JURISDICTION—June 7, 1965

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

PLAINTIFFS' EXHIBIT NO. 2
Nos. 69 & 71, O.T. 1965

OFFICE COPY

**Report of the
Presidential
Railroad
Commission**

Washington D.C.

February 1962

PRESIDENTIAL RAILROAD COMMISSION

REPORT

of the

PRESIDENTIAL RAILROAD
COMMISSION

Washington, D.C.

February 1962

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J. E. WOLFE

EMPLOYEE ORGANIZATION MEMBERS

JAMES W. FALLON

S. W. HOLLIDAY

S. C. PHILLIPS

H. F. SITES

A. F. ZIMMERMAN

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Charles F. Mott

Nancy G. Smith

George J. St. Pierre

Gladys B. Wash

*Appointed on March 5, 1961, following the resignation of James P. Mitchell.

**Walter C. Wallace served as Assistant to Chairman Mitchell.

PRESIDENTIAL RAILROAD COMMISSION

200 MARYLAND AVENUE NE.

WASHINGTON 25, D.C.

February 26, 1962.

Mr. President:

We have the honor to present the report of the Presidential Railroad Commission together with separate statements or dissents submitted by Carrier and Organization Commissioners. This Commission was established by Executive Order No. 10891 of November 1, 1960, to consider, in accordance with the agreement of October 17, 1960, between the Carriers and the Organizations, a controversy between carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America.

Respectfully submitted,

/s/ Simon H. Rifkind,
SIMON H. RIFKIND, *Chairman.*

/s/ John T. Dunlop,
JOHN T. DUNLOP.

/s/ Charles A. Myers,
CHARLES A. MYERS.

/s/ Francis J. Robertson,
FRANCIS J. ROBERTSON.

/s/ Russell A. Smith,
RUSSELL A. SMITH.

/s/ B. B. Bryant,
B. B. BRYANT.

/s/ T. A. Jerrow,
T. A. JERROW.

/s/ Guy W. Knight,
GUY W. KNIGHT.

/s/ Daniel P. Loomis,
DANIEL P. LOOMIS.

/s/ J. E. Wolfe,
J. E. WOLFE.

/s/ James W. Fallon,
JAMES W. FALLON.

/s/ S. W. Holliday,
S. W. HOLLIDAY.

/s/ S. C. Phillips,
S. C. PHILLIPS.

/s/ H. F. Sites,
H. F. SITES.

A. F. ZIMMERMAN.

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- Vol. II. Pay Structure Study, Railroad Operating Employees
- Vol. III. Studies Relating to Railroad Operating Employees
- Vol. IV. Studies Relating to Collective Bargaining Agreements and
Practices Outside the Railroad Industry

CHAPTER 1

Basic Approaches

Part I

INTRODUCTION

CHAPTER 1

Basic Approaches

An elaborate system of rules, practices, and decisions, developed over a period of more than 100 years, governs the manning of American railroad engines and trains, the assignment of railroad operating employees to their daily tasks, and the intricate formulas under which they are paid. This system derived from long-established practices and habits, from collectively bargained agreements, from decisions of courts and arbitration tribunals, from Federal and State legislation, and from actions taken by the United States Director General of Railroads during and immediately after World War I when the railroads were under national control.

By World War I the system had substantially matured into its present form. Directives of the Director General of Railroads codified and standardized the evolving practices. Further evolution has continued, but essentially in the same mold.

The system which has thus emerged might well be called the "common law" of railroad labor relations. It is in fact treated by employers and labor organizations in the industry much as though it were a system of law.

The Need for Change

Any common law must have capacity to change and grow, else it fossilizes into a ritual, and hinders rather than advances the interest which it is designed to serve. In railroad labor relations the principal and, in fact, the ultimate means of change has been collective bargaining. The railroad industry has been a pioneer in the development of American collective bargaining. In a free society primary reliance must continue to be placed on this means for future change. There is no other choice; no superior method has been suggested or invented. In the final analysis, America cannot be served by any but uncoerced workers and uncoerced management.

Sometimes, however, collective bargaining, like an engine, may need auxiliary support or stimulation, to get started on an unusually difficult course or to traverse uncharted terrain. Sometimes a locomotive must be guided by signals transmitted by persons on the ground who are able to see ahead. Similarly there are occasions when neutral

members of the public may be able to illuminate a path not previously recognized by the parties themselves which employers and employees can walk honorably together.

Neutrals have often played such a role in the railroad industry. In part, this role has been a requirement of statute, reflecting broad public recognition that work stoppages which might ensue from failure to resolve labor-management disagreements were not in the public interest. In part, the very availability of neutrals may have invited frequent recourse to their use. The nationwide distribution of the industry and the multiunion representation of its labor force have also often made it difficult for the parties themselves to resolve disputes of a kind that have been settled without neutral participation in other industries.

This Commission was generated out of a recognition by both labor and management in the railroad industry that basic and even revolutionary changes have occurred in the industry over the past 40 years. The scope of the changes has been so broad that, given the traditions and institutions of the industry, neutral participation was regarded as crucial to the adjustment of work and compensation rules to the changed circumstances. The basic features of these broad changes, as reflected in the hearings, studies, and observations conducted by the Commission, are three.

1. Technological advances, while not necessarily the most important of the changes that have taken place, have probably been the most conspicuous.

Engines have increased in size and power, and diesel has supplanted steam. During the very months in which this Commission was deliberating, one of the last steam engines built for use in the United States was rolled into its permanent resting place in the Museum of History and Technology of the Smithsonian Institution.

Increases in engine power have made possible expansion of the length, weight and sustained speeds of trains.

The size and capacity of trains and cars, as well as improvements in the design and quality of wheels, bearings, rails and roadbed, have had similar effects.

Mechanical and electronic aids have helped to identify and locate defective equipment and hazards on the right-of-way, and thus have been of aid in reducing accidents and delays.

With better planning, there has been more intense use of both engines and cars, and less transportation of empties.

A revolution in communications is well on its way: the telegraph key is no longer the important method of communication

that was once prevalent on the road; the telephone and radio are supplanting it. Electronic devices unknown 40 years ago, such as those now used in Centralized Traffic Control, have caused significant changes in the character of road operations.

The use of automatic switching and retarder systems for directing and braking the movement of cars in classification yards, as well as extensive reorganization of the geographic locations at which train classification takes place, have caused wholesale changes in both the nature and volume of yard work.

2. The position of the railroad industry in the total pattern of American transportation has undergone drastic change.

Forty years ago, the railroads stood as the virtually unchallenged source of continental transport for both passengers and goods. Today, they are confronted by the insistent competition of the truck, the bus, the airplane, the automobile, the pipeline, and water transport. New modes of transport are on the horizon.

The railroad transportation mix has changed considerably, with the decline of passenger service relative to freight, the decline of short-haul freight relative to long-haul freight, and the decline of general merchandise relative to bulk cargo.

Determination of the most effective form of transport for many types of passenger travel, for many varieties of commercial goods, and for movement over various distances is subject to continual reexamination and change.

3. Unionization has come to many basic American industries whose employees were unorganized 40 years ago. Employees in these industries have achieved improvements in earnings and working conditions which railroad employees and other organized workers possessed long before. As the productive power of our economy and its ability to provide an improved life have increased, wages and other benefits have increased both in the railroad industry and in other industries. The achievements of employees in outside industry have caused railroad employees to reexamine the entire question of fringe benefit levels in the railroad industry.

Many improvements have been made in railroad operations to accommodate them to these revolutionary changes in technology and to the changes in the national context in which the railroad industry operates. These improvements have been made under the existing system of working rules or by negotiating special agreements. Significant changes in overall manning requirements have occurred within the framework of existing rules. Longer trains are operated by crews of the same size as the crews that years ago operated shorter trains.

Consequently the number of employees needed to move a given volume of tonnage over the road has decreased. Similarly, in yards that have been automated, there has been a sharp decline in the number of persons required for the performance of a given volume of yard work. Between 1920 and 1960 railroad employment has declined from 2,000,000 to less than 800,000. Overall railroad productivity, as measured by the number of man-hours involved in handling a given volume of traffic, has increased significantly.

It is equally true, however, that the system of "common law" under which the industry has operated for the past 40 years has not been sufficiently flexible to permit many changes in manning and assignments which are appropriate in the light of the technological and economic revolutions that have taken place.

Collective bargaining as hitherto practiced has permitted a lag to develop between the rate of change in the "common law" of the industry and the rate of change in railroading and the nation. For some years it has been clear both to labor and to management in the industry that sooner or later it would be necessary to close the gap between the technology and operating potential of railroading and the work and compensation rules governing the industry and its operating employees. That an inquiry of the kind conducted by this Commission was not initiated earlier reflects in part the complexity, difficulty, and delicacy of the subject matter involved, in part a number of tactical considerations regarded by the parties as important, and finally, differences over the composition and responsibility of the proposed commission and the procedures to be followed by it.

To close the gap between technology and work and compensation rules, railroad management and labor have undertaken, through this Commission, a venture unique in the history of American railroad labor relations. The composition of the Commission, the scope of its work, the participation in one proceeding of all the operating employee Organizations, the flexibility and variety of the Commission's procedures, are all evidence of labor's and management's determined willingness to find solutions. As a result, the inquiry made by this Commission has been the most comprehensive ever undertaken in the United States concerning the working rules and pay structure of operating employees of the American railroads.

The Prescription for Change

The study and deliberations of the Commission have led us to the conclusion that some rules should be eliminated; others require substantial revision; and several situations have been exposed in which modernization requires an entirely new set of rules or practices.

Revision and modernization require, in brief:

- (a) That the rules governing the manning of engines and trains and the assignment of employees be revised to permit the elimination of unnecessary jobs and at the same time to safeguard the interests of the individual employees adversely affected;
- (b) that the entire complex and intricate system of compensation be overhauled, and;
- (c) to effectuate the revisions called for in (a) and (b), and to ensure that rules and arrangements are kept abreast of changing conditions, that the procedures for the administration of rules and the disposition of grievances be revised.

As background for considering the complex issues before the Commission, we shall first set forth several basic concepts. These general considerations are, in many ways, as important as the specific recommendations which we make. They set the framework within which we believe it will be possible for the parties to find solutions for their problems.

1. It is our view that the solutions to the issues before us must be found within the framework of collective bargaining.

One of the major tasks that has occupied us has been to develop procedures that will make collective bargaining work better in the areas we have explored. We believe that such procedures can be developed, and our recommendations spell them out in some detail. We do not believe that the questions in dispute should be removed from the scope of collective bargaining. We believe that the procedures for handling these problems within the collective bargaining process, and the responsibilities of labor and management in this process, should be redefined.

Such essentially procedural reforms can, we believe, strengthen the collective bargaining process.

2. It is our view that railroad management and the operating brotherhoods should consciously plan the decade of the 1960's as a period of transition and adaptation to the new arrangements herein proposed. It should be their objective to achieve a rational system for the deployment and compensation of the labor force and reasonable job security for those who have committed their lives to the industry. This should provide the industry and its employees with greater capacity to meet the challenge of the outside forces which have become of such importance in shaping the industry's destiny.

A period of transition is necessary because it is not prudent to make a sharp and precipitate break with the past. Were it

possible to start afresh, to write on a clean slate, we believe that rational men would not today begin with the existing code of rules as the basic point of reference for the future. We are not free to start afresh, however. Lives and livelihoods have been committed to and are held hostage by the existing order. Revolutionary changes even for the better carry a high price in disruption. That price might exceed the value of the improvement. Moreover, personal and social values are involved which in this country we prize highly. They cannot be measured merely on a dollar scale.

Inescapably, we find ourselves in an area where the best must yield to the better. Improvements will more readily be achieved by following an evolutionary trend. The formula for correction will be more successful in operation if it is endowed with a time dimension.

3. The Commission, in most of its recommendations, has concentrated on the general direction of change. A heavy responsibility rests upon the parties through collective bargaining to reduce to detailed language and specific agreement the precise measures and the staging of the transition that will ensue. The parties who will live with their agreements for decades to come must develop the ways in which the new order will be achieved.

The maximum contribution would be made by this Commission if it could with precision forecast the position of the industry, say 10 or 20 years hence: if it could forecast its position in relation to technology, to other modes of transport, and to working conditions in nonrailroad occupations. If we were possessed of such talent to prophesy, we would then be able to schedule precise changes in rules which would produce at the specified point of time in the future a code which would be of contemporaneous relevance to the conditions then existing.

On some of the matters before this Commission it has been possible nonetheless to set forth detailed and specific prescriptions. For others, the requisite degree of prescience is not given to us. We can do no more than make approximate forecasts on the basis of current trends. We have not shirked the task merely because it has been difficult.

We are fully aware, however, that there is room for difference of judgment concerning the time, the degree, and the precise manner in which many of the adjustments should take place. We are persuaded that the degree of particularization which our recommendations contain is sufficient to provide the catalysis necessary for the parties themselves to close the gap that has developed between the technology and the economics of the industry, on the

one hand, and the rules governing the pay, assignments, and working conditions of its operating employees, on the other.

4. It is our view that the parties should take positive action to ensure that the transition proceeds satisfactorily and rapidly, and that future adjustments to changes in technology and economics are handled without the occurrence of multidecade lags. We deem it important that the parties themselves establish a continuing joint activity to assure the success of the venture on which they embarked when they signed the agreement which led to the establishment of this Commission. The Commission is but a first step, a beginning in the process of actually achieving a new state of affairs in the industry.

Since the realization of a new pay and manning structure will clearly have to take place over a period of transition, continuous review of the rules in the light of technological and other developments in the industry should be one of the major tasks of such joint activity.

5. It is our view that the railroad industry and the Organizations which represent its employees must begin to take an overall view of the industry's manpower. At present people and jobs are affected by many separate and uncoordinated events. Some circumstances have led to employment declines, and others will lead to further employment declines. The industry has a sizable casual work force and in many respects manpower is wastefully utilized. At the same time, although the industry's employment has been declining generally, several thousand new employees have been hired each year. A coordinated manpower review should be undertaken to plan for more effective, secure, and equitable manpower administration. The industry has in the past taken major steps to improve the utilization of freight cars by pooling and coordination on a national basis. We believe that a coordinated program should also be undertaken with respect to the industry's employees.

6. The basic considerations which have governed our thinking in formulating recommendations have been that the Nation is entitled to a safe and efficient rail-transport system, that management should be accorded reasonable opportunity to install technological improvements, that employees are entitled to work under a sound and equitable pay structure and under conditions which promote efficiency, safety, and security, and that where improvements in technology leading to greater productivity adversely affect employees, adequate provision must be made for their welfare.

Some of the material presented to the Commission has dealt with the industry's financial ability and its capacity to meet the competition it faces. The conclusions of this Commission are not based on judgments concerning the ability or inability of the industry to pay. The directions to be taken in solving the problems before us do not, in our opinion, depend upon an evaluation of the industry's finances. Views concerning finances might conceivably affect the pace of necessary adjustments, but they do not bear significantly upon the directions which adjustments should take.

7. This Commission's deliberations have occurred during a period of deep public concern regarding national transportation policy. The problems of the railroad industry are among the principal stimuli of this concern.

From the material presented to the Commission, it has been apparent that solution of many of the economic problems of the railroad industry, and the solution of many of its labor problems as well, depend basically upon solutions of economic and managerial problems far beyond the scope of this Commission's assignment. The recommendations herein made will make a greater contribution towards harmonious labor relations in the railroad industry if they are accompanied by the adoption of an integrated national transportation policy covering all forms of transport and a maximum effort by railroad management to become as efficient and imaginative as possible.

The Importance of Change

The country, the carriers, the operating employees, and their labor organizations cannot afford to miss this opportunity for self-correction of rules and practices. Never in American history have railroad labor relations been more thoroughly examined or more fully ventilated than during this past year. The effort has entailed the expenditure of much time, exertion, and money. The minds of many informed persons have been brought to bear upon the problems involved. Neither the national welfare nor the welfare of the railroad operating employees nor the welfare of the carriers will be served by a stubborn refusal to yield the status quo or to accept a new idea in the belief that some cherished privilege or practice will be endangered. There is a common interest in railroading which the carriers, the employees, and the Nation all share. The revision of the rules should serve that interest.

As for the future, we have been and are alive not only to the benefits of change, but to the hazards of change as they affect the individual worker. Pervading both our reflections and conclusions is the conviction

tion that among this Nation's most precious assets are the energy, skills, and talents of its workers. We believe that it degrades the human personality and impoverishes the Nation to allow these assets to be wasted or workers to suffer unreasonably abrupt dislocation and insecurity. Our recommendations reflect our concern for railroad operating workers as individuals and for the group as a whole. Beyond the specific recommendations that reflect this concern we are encouraged by the knowledge that America is growing, that its standard of living is rising, that the demands of its people for goods and services are constantly expanding, and that an efficient, safe, and modern railroad system in muscular trim for effective competition, will provide better employment opportunity than a system headed toward decline by its own obsolescence.

CHAPTER 2

The Scope of the Commission's Work and the Nature of its Operation

The Commission's basic responsibility has been to investigate, consider, and mediate certain specific issues between the major railroads of the country and the five brotherhoods representing operating employees.

The Issues

These issues are of great magnitude and result from conflicting demands set forth in "notices" filed under Section 6 of the Railway Labor Act. By their agreement of October 17, 1960,¹ the parties in effect agreed that only an extraordinary procedure was adequate to deal with issues of such scope. The agreement provided that the proceedings of the Commission were to be in lieu of the customary mediation and emergency board procedures provided by the Railway Labor Act.

The demands or "notices" of the Carriers, dated on or about November 2, 1959, were in the form of detailed and specific proposals covering a wide range of subject matter. The employee proposals or "notices" of September 7, 1960, were brief in form but also were very broad in scope. During the course of the hearings before the Commission the employee Organizations submitted a series of "implementing proposals", amplifying and particularizing the more general proposals contained in their formal notices.

Clarification of the meaning and intent of both groups of proposals, expressed in technical language not always clear even to the seasoned and sophisticated practitioners in the field of railroad labor relations, was one of the tasks to which the Commission frequently had to turn its attention. The extent of this process of clarification is illustrated by the events which followed the Organizations' submission of their "implementing proposals." The Carriers, by agreement of the Commission, submitted a group of questions, embraced in a volume of 116 pages, designed to elicit clarifying answers. Such answers were

¹ The text of this agreement and of Executive Order 10891, establishing the Commission, are reproduced in appendix A.

submitted by the Organizations, after some weeks of study, in a two-volume presentation totaling 174 pages. This documentation itself led to further effort at clarification during the Commission's hearings and private sessions.

The specific proposals of the parties are reproduced in appendix B.

The proposals, many of which are interrelated, deal, in brief, with the manning of engines and trains, the structure of the entire compensation system, the rules governing the assignment of employees, and provisions for employee security. Because the specific issues are so detailed and complex, no effort to summarize them can adequately reflect the many subtle considerations which are crucial to proper understanding. For this reason no effort is made to summarize them in this section of the report. Subsequent chapters deal with the issues in appropriate detail.

Several other matters which have arisen during the course of the Commission's deliberations are considered at various points in this report. Although not raised directly as the demands of the parties, these matters are nonetheless significant for the solution of the problems before the Commission. They are matters relating in general to the adjudication of disputes, the development of adequate statistical and other factual data for dealing with the kind of problems the Commission has had before it, the coordination or integration of policy in the railroad industry whose operating employees are represented by five separate unions, and certain problems arising out of operations of the Railway Labor Act.

The Parties Involved in the Proceeding

The Carriers who are parties to this proceeding are 195 railroad companies which operate 92 percent of the railroad mileage of the country and employ 94 percent of the industry's employees, of whom about 26 percent are operating employees involved in the present proceeding. The Carriers were represented before the Commission by counsel appearing on behalf of the three Carriers' Conference Committees: the Western Carriers' Conference Committee, the Eastern Carriers' Conference Committee, and the Southeastern Carriers' Conference Committee, who were signatories of the agreement of October 17, 1960, which was the basis for the establishment of the Commission.

The labor Organizations who are parties to this proceeding are the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America. The chief executives of these

Organizations had been signatories of the October 17, 1960, agreement. The Organizations were represented before the Commission by counsel.

A list of the railroads involved in the proceeding is set forth in appendix C. Lists of counsel for the Carriers and the Organizations are set forth in appendix E.

The Procedures of the Commission

The general procedural framework for the Commission's operation was set forth in the agreement of October 17, 1960, which is reproduced in appendix A. The Executive Order establishing the Commission, which is also reproduced in appendix A, directed the Commission to conform its proceedings and activities to the agreement of October 17. Because of the essentially voluntary basis upon which the Commission rests, as well as the ultimate necessity that the dispute be settled by agreement between the parties, the Commission, wherever possible, proceeded by common consent.

Beyond the procedures specified in the Executive Order and the agreement of the parties, there were no specific rules governing the way in which the Commission should function. The Commission established no formal rules, but proceeded in a manner derived from its collective experience, which, in its judgment, would best discharge the functions for which it had been created.

There was general agreement that the traditional procedures used by emergency boards created under the Railway Labor Act were not suitable for a commission of this character. The issues were unusually broad and complex. Many more parties were involved. The Commission itself was composed of members drawn from labor and management as well as from the general public. Methods of inquiry not normally used under the procedures of the Railway Labor Act were contemplated, and the Commission for this purpose was furnished unusual facilities in the form of staff and the assured cooperation of agencies of the Government.

The Commission, after discussion and deliberation, decided to use every appropriate method within its reach to obtain a factual understanding of the practices involved in the industry, related practices in other industries, and a comprehension of the issues. It concluded that several basic procedures were necessary:

- Public hearings, at which the parties could present their evidence through their own lay and expert witnesses;
- Studies by the Commission and by experts selected by the Commission, independent of the parties;

- Field inspection trips by the public members of the Commission to observe the activities over which there was dispute.

The Scope of the Factfinding Process

The factfinding stage of the Commission's activities consumed most of the period from February 1961 until the beginning of November 1961. All three processes originally contemplated by the Commission were employed. Both the Carriers and the Organizations took full advantage of the opportunity given them to present evidence during the hearings, and cooperated fully in planning and executing the studies and the observation trips. In addition, throughout the proceedings, the public or neutral members of the Commission were able to profit greatly from the many opportunities they had to learn from their knowledgeable Commission colleagues representing management and labor.

The Hearings

The hearings held by the Commission occupied 96 days. The total record of these proceedings embraces 15,306 pages of transcript. In addition, the record includes a total of 319 exhibits, 189 introduced by the Carriers and 130 by the Organizations. These exhibits, which aggregate an additional 20,319 pages, were supplemented by photographs, slides, motion pictures, and other documents, charts, and visual presentations and models.

During the hearings, 79 witnesses appeared before the Commission and additional statements were filed on behalf of 155 witnesses.* Examination of witnesses was conducted by both Commission members and counsel for the parties.

Because of the great length of the record it was deemed desirable to prepare, for the use of the Commission, an index-digest to the full text of the record. This index-digest, which is to be found in Appendix Volume I to this report, is not in any sense a substitute for the record itself or a statement of findings from the record; it is a convenient tool for using the record.

The Studies

The studies program of the Commission included major pioneering examinations of pay structure and manpower, together with 20 additional technical monographs designed to help the Commission in its consideration of the matters pending before it.

The studies program was developed in detail by a tripartite Technical Subcommittee, which was established pursuant to decision of the Commission and whose members operated in consultative capacity

* A list of appearances and statements is contained in appendix D.

to the Commission's Executive Director. Excellent cooperation and good working relations at the technical level resulted in the rapid development of comprehensive study proposals which were presented to and approved by the Commission. As authorized by the Commission, the Commission staff undertook these projects with the cooperation of other agencies of the Government, notably the Bureau of Labor Statistics, the Railroad Retirement Board, and the Interstate Commerce Commission; and a number of outside experts who were retained to undertake specific tasks. The studies program embraced a wide area of subject matter and included ideas submitted by Carrier, Organization, and neutral participants. It covered virtually the full range of a group of specific proposals for study which were submitted to the Commission's Technical Subcommittee by representatives from the labor Organizations. The following is a complete list of the studies undertaken for the Commission.

A. Studies Relating to Operating Employees

1. Pay Structure of Railroad Operating Employees.
2. Employment Trends and Manpower Characteristics of Railroad Operating Employees.
3. The History of and Experience Under Railroad Employee Protection Plans.
4. The Procedures and Functions of the National Railroad Adjustment Board, First Division.
5. Seniority Practices—Railroad Operating Employees and Other Industries.

B. Studies Relating to Collective Bargaining Agreements and Practices Outside the Railroad Industry

TRANSPORTATION INDUSTRY PAY PRACTICES

6. Pay Practices for Flight Employees on U.S. Airlines.
7. Evolution of the Current Pay Practices and Fringe Benefits in the Over-the-Road Motor Freight Industry.
8. Pay and Related Practices in Local Cartage.
9. Pay and Related Practices of Drivers in the Intercity Bus Transportation Industry.
10. Pay and Related Practices of Operators in the Urban Transit Industry.
11. Pay Practices on U.S. Flag Ships on the Great Lakes and the Oceans.
12. Pay Practices in Inland Waterway Transportation.

ANALYTIC STUDIES OF SPECIFIC PRACTICES

13. Collective Bargaining Approaches to Employee Displacement Problems.
14. A Summary of Incentive Practices in American Industry.
15. History of Basic Work Hours and Related Benefit Payments in the United States.

STUDIES OF CONTRACT PROVISIONS, BY TYPE OF PROVISION

16. Daily, Weekly, and Monthly Pay Guarantees.
17. Severance Pay; Protection of Employees in Technological Displacement.
18. Shift Differentials.

19. Paid Holiday Provisions.

20. Premium Pay for Overtime.

21. Hours of Work.

22. Pay and Special Allowances for Time Away from Home.

Drafts of the studies were submitted to the members of the Commission. Comments of Commission members were given to the study authors for their consideration. The studies themselves, as revised, are reproduced in Appendix Volumes III and IV, with the exception of the pay structure tabulations, which are in Appendix Volume II. The Commission has undertaken to reproduce these studies not only because they have been of value to it, but because they should prove of value to others. They are, of course, not findings of the Commission, but the work and findings of independent experts. The author in each case is responsible for his own findings. In the case of those studies prepared by the Commission's staff, the Executive Director of the Commission assumes responsibility for the content of the studies.

Observation Trips

Following the Commission's decision that the public members should make observation trips in order to observe at first hand the operations involved in the dispute, specific trip itineraries were developed by special subcommittees of the Commission. These subcommittees were composed of Carrier and Organization members who consulted extensively with management and union officials familiar with operations throughout the country. Final selection of the actual itineraries was made by the public members of the Commission from alternative itineraries developed by the bipartisan subcommittees. This process of selection was in part used to insure that the visits were made with minimum notice to the officials and Organization representatives on the railroads involved.

Following a number of eastern trips, a most extensive series of trips took place during August 1961, in the western part of the country. Last-minute changes in itinerary were made by the public members in several cases while *en route*. Because of the extensive nature of the trips, advance notice was in some cases unavoidable. To ascertain whether these trips were in fact representative, the Commission made special arrangements to obtain data concerning similar trips for an earlier period. These data were supplied by the Carriers and were made available to the Organization members of the Commission for checking.

The trips took the public members over thousands of miles of railroad facilities. The trips covered passenger train operations, through and local freight service, yard work, dock and harbor activ-

ities, and industrial switching. They encompassed all types of terrain—mountain, desert, plain, and valley—and main lines as well as branch lines. The Commission members saw many densities of traffic conditions under varying circumstances, both day and night, as well as a wide range of equipment and types of traffic control. The trips also enabled the public members to make observations of the job duties and working conditions of the employees involved and of the various factors which affect job content.

It was the conclusion of the public members that, making due allowances for special or unusual circumstances, the trips gave them an extensive view of the work done by operating employees and of the operations involved in the dispute before the Commission. The observations made on these trips made vivid much of the oral evidence given during the course of the Commission's hearings.

Executive Consideration and Mediation of the Issues

The Commission held numerous executive sessions during the period of its operation. Following the fact-gathering phase of its work, it held a series of special sessions to review each of the issues, to gain a fuller understanding of the positions of the two sides. The Commission met together on each of the issues before it, and in addition the public members met privately with the Carrier members and with the members from the Organizations. Throughout the life of the Commission, the public members had the benefit of many frank and revealing discussions with individual Commission members from the Carrier and Organization sides and with other key individuals of management and labor. These persons have first-hand knowledge of railroad operations and of many of the more subtle considerations which lay behind the positions of the parties. Their knowledge and judgment have been invaluable to the public members and have helped them immeasurably in formulating the series of recommendations contained in this report.

Following the fact-gathering stage of the Commission's proceedings, the public members assiduously sought to narrow the issues, explored the feasibility of direct negotiations by the parties, and in general sought to find any process which would have resulted in an agreement prior to the issuance of the Commission's report. On a number of issues, significant modifications of formal position were stated to the public members in confidence; but it became apparent that the issues on which agreement could be reached would not be sufficient in scope to settle the entire range of issues in dispute before a report was issued. In a final effort to reach a mediated settlement, the public members early in 1962 presented, orally, a series of proposals to the Carrier and Organization members of the Commission in the hope

that such a step could set in motion the give-and-take that would lead to a settlement. It became clear, however, that no such settlement could be achieved before the expiration of the Commission's authority and this report has therefore been prepared pursuant to the requirements of the Executive Order.

The remainder of this report deals with the specific issues before the Commission.

Part II

CHAPTER 3

Manpower in the Railroad Industry: Operating Employees

The manpower of the railroad industry represents one of our national assets. The industry's work force is a key resource composed of employees of varied skills and occupations, including those who man the trains. We are concerned in this report only with the "operating employees"—principally locomotive engineers, firemen-helpers, conductors, brakemen, and switchtenders.* These operating employees have had to adjust to a way of life which is in many ways different from the pattern of employees in "outside" industry. They are subject to call at irregular hours, round the clock; many of them cannot accommodate their time away from duty to the normal family program of free Sundays and evenings. Many of them must spend considerable time at distant terminals, away from their families and communities. They work out of doors regardless of weather, in the desert heat, or pouring rain, or amid snow and ice. Until they have achieved very considerable seniority they are subject to irregularity of employment and often to extensive furloughs.

A review of past employment trends for *all* railroad employees is essential for a balanced consideration of all facets of the operating manpower questions before us. The complex issues before us raise many implications affecting the future of the industry's manpower. Carrier proposals relating to the use of firemen-helpers and the composition of road and yard crews (called "consist" of crews) would affect future employment in the operating occupations. The proposals for changes in hours of work and the present system of pay coupled with the proposals to establish interdivisional runs would also affect future manpower needs, as would the request to combine road and yard service. Organization proposals, emphasizing irregularity of employment, involve employment stabilization, income guarantees, and uniform minimum crews, among other things.

*Other terms are sometimes used interchangeably with these classifications. For example, "motormen" are also "engineers"; "firemen" or firemen (helpers) are the same as "firemen-helpers"; "conductors" are "yard foremen" in yards; "helpers" are yard brakemen; and "switchmen" are "yard conductors" (foremen), "yard brakemen" (helpers), or "switchtenders." In this report, we occasionally use some of these terms rather than those in the text above.

Railroad operating employees, as well as other railroad employees, are understandably concerned about future employment opportunities in this basic transportation industry. The public interest demands the maintenance and further development of a safe and efficient railroad system, as we have noted, and this includes the effective utilization of the industry's trained and skilled manpower.

Thus, understanding of manpower trends and the characteristics of railroad operating employment are basic to consideration of the issues before us. Manpower consequences permeate nearly every issue.

Past Trends

Historically, the railroad industry has been one of the largest employers of manpower in the United States. During World War I, there were over 2 million jobs on the railroads. Except for increases resulting from the unusual transportation demands of World War II, the number of jobs had declined steadily to less than 800,000 in 1960. This declining trend is shown in the following table, drawn from data published by the Interstate Commerce Commission:

*Average Annual Employment—
Class I Line-Haul U.S. Railroads*

1920—	2,022,832
1925—	1,744,311
1930—	1,487,830
1935—	994,371
1940—	1,026,848
1945—	1,419,505
1950—	1,220,401
1955—	1,057,866
1960—	780,971

The figures in the table reflect average annual mid-month employment, and provide a reasonable indication of the number of railroad jobs in each year. Traditionally, more employees have been attached to the industry than the number of full-time jobs available. Therefore, we must also consider the number of employees attached to the industry in relation to the number of jobs.

The average number of employees attached to the railroads can be computed from Railroad Retirement Board data showing the number of employees attached to the industry in January of each year. Even though some of the employees covered by this count had only limited employment during the year, these data provide a satisfactory picture of the aggregate number of individual employees attached to the industry at any one time.*

* The data which follow are drawn from the *Study of Employment Trends and Manpower Characteristics of Railroad Operating Employees* (hereafter referred to as *Manpower Study*), prepared for the Commission by the Bureau of Labor Statistics, U.S. Department of Labor. This study is the most extensive investigation of employment and manpower

Between 1948 and 1959, the number of railroad jobs (ICC data) declined 30 percent, from 1,327,000 to about 815,500, and the number of railroad employees attached to the industry (RRB data) dropped 47 percent from 1,956,000 to slightly over 1 million, as employees with little seniority attachment to the industry left for other jobs or were furloughed. The following table shows the trends in the data for all railroad employees, for the operating employees, and for the nonoperating employees (such as clerical and station employees, maintenance of way crews, and shop crafts, who are not involved in the present proceeding).

Total Railroad Operating and Nonoperating Employment

	1948		1955		1959	
	RRB	ICC	RRB	ICC	RRB	ICC
Total class I railroad employment.....	1,955,989	1,325,905	1,413,900	1,055,215	1,039,064	815,474
Total operating.....	366,509	292,925	301,111	243,909	260,953	210,673
Total nonoperating.....	1,589,480	1,033,980	1,112,499	814,607	778,122	604,801

SOURCE: *Manpower Study*, table 1, Appendix Vol. III.

It should be noted that over the 1948-59 period the operating employee group dropped by 29 percent, which was substantially less than the 47 percent overall decline. Thus, declining employment was greater within the nonoperating employee group during the postwar period. Put in another way, the proportion of total railroad employment represented by operating employees increased from 19 percent to 25 percent between 1948 and 1959.

Still another measure of relative employment decline is the ratio of total employees to jobs available (ratio of RRB data to ICC data). For operating employees, this ratio has been fairly steady over the period: 125.1 in 1948, 123.6 in 1955, and 123.9 in 1959. But the comparable ratio for nonoperating employees has dropped from 153.7 in 1948, to 136.6 in 1955, and to 128.7 in 1959. In other words, during the

characteristics of an important part of the railroad industry ever made, and it provides a sound basis for future manpower planning on U.S. railroads. The Commission study uses data from the Railroad Retirement Board because they provide information on age, service, retirement, and other manpower characteristics in which the Commission was interested. The mid-month count of the number of employees on the payroll in each occupational group, as reported in the M-300 forms of the Interstate Commerce Commission, does not contain breakdowns showing other manpower characteristics. As we have noted, an additional important reason for using RRB data instead of ICC data is that the former provides a more accurate picture of the number of employees attached to each occupational group in January of each year whereas the ICC data show the number of jobs in each occupational group. If we want to know how numbers of employees as well as numbers of jobs in each occupation have changed over the years, both sets of data must be used. For a Technical Note comparing RRB and ICC data see the *Manpower Study*, which is reproduced in Appendix Volume III.

entire postwar period, there were approximately 5 employees for every 4 operating jobs, as compared to 6 for every 4 nonoperating jobs in 1948, and 5 for every 4 in 1959.

During this period, when both the number of jobs and the number of employees were declining sharply on the railroads, though at different rates for operating than for nonoperating employees, the number of production workers in manufacturing fell less than 4 percent and nonagricultural employment as a whole rose 17 percent. Thus, railroad operating employment and jobs declined more than production worker employment in manufacturing at a time when employment generally was rising in the United States.

The decline in railroad operating employment resulted from a number of factors, among which increasing competition from other forms of transportation and further technological advances in the operation of railroads were most important. Total train miles dropped 36 percent between 1948 and 1959, while passenger train miles fell 43 percent.* Technological changes which reduced railroad employment included the replacement of the steam locomotive by the diesel, which required less maintenance, had greater pulling power, and could handle longer trains. Other changes included Centralized Traffic Control systems, radio communication, and automation of yards.

In the sections of this chapter which follow, we shall present briefly the facts underlying post-World War II changes in the following categories: (1) employment in the various operating occupations classified by types of service; (2) movement within and between operating and nonoperating occupations; (3) the age and length of service patterns of operating employees, and (4) separation rates of operating employees. These will provide the background for a look ahead in the railroad industry, as well as for the consideration of the complicated issues concerning which we are called upon to make recommendations looking toward an agreement between the Organizations and the Carriers.

Postwar Changes in Railroad Operating Occupations

Operating employees typically work either in *engine service*, as engineers, firemen-helpers, or hostlers and hostler helpers (the latter group move locomotives to and from roundhouse and ready tracks); or in *train service*, as conductors, brakemen, baggagemen, and switch-tenders. The number of employees attached to each of these occupations decreased between 1948 and 1959, as the following table shows.

* Computed from data in *Transport Statistics in the United States*, Bureau of Transport Economics and Statistics, Interstate Commerce Commission, Annual Reports, cited in *Newpower Study*.

Employees Attached to Operating Occupations, 1959

Occupation	1959		Percent change, 1948-59
	Number	Percent	
Total.....	260,932	100.0	-39
<i>Train service</i>			
Conductors.....	34,401	13.2	-39
Brakemen.....	122,910	47.1	-33
Baggage men.....	2,367	.9	-33
Switchtenders.....	3,009	1.2	-35
<i>Engine Service</i>			
Engineers.....	32,934	12.6	-39
Firemen (helpers).....	61,085	23.4	-33
Hostlers and hostler helpers.....	4,186	1.6	-40

Source: *Manpower Study*, summary of tables 3 and 5 through 8.

These operating occupations are found both in *road service* and in *yard service*. The distribution of employees in 1959 between these two services, and the percentage decline since 1948, are summarized below:

Employees Attached to Road and Yard Service, 1959

Occupation	1959		Percent change, 1948-59
	Number	Percent	
Total.....	260,932	100	-39
Road.....	133,188	51	-37
Yard.....	120,800	46	-16
Serving both road and yard (hostlers, hostler helpers, and switchtenders).....	7,255	3	-38

Source: *Manpower Study*, summary of table 3.

Further analysis of the division of operating employees between road freight service and road passenger service shows that nearly four times as many are attached to jobs on freight trains as on passenger trains, and that employment in passenger service has declined more than in freight service since 1948.

Movement Between Railroad Occupations

There is not much movement between operating and nonoperating jobs on the railroads. Only 15 percent of the operating employees in service in 1959 had worked on nonoperating railroad jobs at some time during the year 1948 through 1958. The percentage is higher for some occupations such as switchtenders, hostlers and helpers, and road conductors; it is lower for engineers. In contrast, the stability of occupational attachment among operating employees is shown by the fact that 85 percent of those employed had either worked in the

same occupation or in a related occupation in the promotional ladder in the years between 1948 and 1959. For example, firemen-helpers are promoted to engineers, and brakemen to conductors.

Age and Service Characteristics of Operating Employees

Railroad operating employees are somewhat younger than non-operating employees, but older than male workers in outside industry generally. The variations in median age between operating occupations are more striking, reflecting the existing ladders of promotion. For example, the median age for each operating group in 1959 was as follows:

Engineers -----	59
Conductors -----	53
Hostlers -----	48
Baggagemen -----	48
Firemen-helpers -----	42
Brakemen -----	41
Switchtenders -----	41

In 1959, 22 percent of all employed engineers (and nearly 25 percent of the road engineers) were 65 years of age or over, and more than 5 percent were 70 years old or over. Only 3.7 percent of the firemen-helpers were over 65, and less than 1 percent were over 70. Fifteen percent of the conductors were 65 or over, and nearly 6 percent were 70 or over. At the other end of the age scale, about 9 percent of the brakemen and 7 percent of the firemen-helpers were under 25.

Twenty-eight percent of railroad operating employees had less than 10 years of service in 1959, and 90 percent of these were brakemen and firemen.* Half of the less-than-10-year service group were under 30 years of age, and 40 percent were in the 30-39 year age group. The following table shows in summary form completed years of service for each operating occupation in road and yard service.

Over the years 1948 through 1959, nearly three-fourths of the operating employees had some work in every month of each year, while 11 percent had some work in less than 6 months of each year. Lack of employment opportunity was not the major reason for less than year-round employment; sickness, retirement, death, and entrance after the beginning of the year were also important. A separate analysis showed that sickness was the most important explanatory factor for

* As used in these data, a completed year of service is 12 months of accredited service not necessarily continuous. A month of service is any calendar month in which an employee had earnings, no matter how small, creditable under the Railroad Retirement Act. Thus an employee with 12 months of accredited service, accumulated over 3 years, would have 1 completed year of service, although he would usually have 3 years of seniority.

conductors and engineers, and unemployment for brakemen and firemen (who had lower seniority).

Years of Service, by Operating Occupations, 1959

Occupation	Number of employees	Completed years of service		
		0-9	10-29	30 and over
		(Percent distribution)		
ROAD SERVICE EMPLOYEES				
Total.....	138,775	21	55	24
Conductors.....	20,650	8	48	45
Engineers.....	20,125	6	40	54
Brakemen and baggagemen.....	60,125	28	56	14
Firemen (helpers).....	37,875	25	65	10
YARD SERVICE EMPLOYEES				
Total.....	142,375	35	49	18
Conductors.....	19,875	12	57	31
Engineers.....	15,400	2	49	49
Brakemen and baggagemen.....	77,975	46	44	10
Firemen (helpers).....	29,125	40	53	7

SOURCE: *Manpower Study*, summary of table 17.

A striking fact is that in the face of declining employment and less than year-round employment for a quarter of the operating labor force (which, of course, is distributed unevenly among railroads and geographical regions), U.S. Class I railroads as a whole hire new operating employees every year. In 1959, they added nearly 9,000 new operating employees to their payrolls, either for seasonal or regular employment. Nearly all were brakemen or firemen; over three-fourths of all new entrants were under 25 years of age, and more than 90 percent under 30. In order to avoid unnecessary new hires when experienced men are furloughed or deprived of employment for lack of work, the Railroad Retirement Board has encouraged the railroads to give priority in hiring to displaced employees from other seniority districts or other carriers. During 1961, over 30,000 furloughed employees were placed through these efforts.

Separation Rates: Attrition of Railroad Operating Employees

Separation rates^{*} for operating occupations are primarily influenced by age; engineers and conductors (being the senior employees) accounted for more than half of the total separations during 1957 through 1959. Almost 33,000 operating employees in all groups with

^{*}Computed from the number of operating employees who permanently leave the railroad industry for reasons of retirement, death in active service, or termination (discharge or voluntary quit).

10 or more years of service were separated from the railroad industry during this period because of retirements (21,469), deaths (6,950), or disability retirements (4,241).

Under the Railroad Retirement Act, railroad employees are eligible to retire with full benefits at age 65 after 10 years of service. However, the average retirement age has risen from 64.3 in 1951 to 66.5 in 1959. The average retirement age in 1959 for various classes of employees was:

Road engineers.....	68.3
Yard engineers.....	67.5
Road conductors.....	67.3
Road passenger baggagemen.....	67.1
Hostlers and hostler-helpers.....	66.5
Yard conductors.....	66.0
Switchtenders.....	66.0
Road firemen-helpers.....	65.7
Road brakemen.....	65.1
Yard firemen-helpers.....	65.0
Yard brakemen.....	64.8

The average monthly benefit provided under the Railroad Retirement Act has increased by 58.3 percent between 1951 and 1959; the average drawn by annuitants was \$162.81 per month in 1959. The maximum annuity at present is between \$205 and \$210 per month, plus \$70 a month for a retired employee's wife.

During the years 1956-58, nearly 50,000 employees left railroad operating jobs for reasons other than retirement and had not returned to railroad work by the end of 1959. About two-thirds of these were brakemen, and one-fourth were firemen. In these two occupations 60 percent of those who left were under 30 years of age, and almost all had less than 10 years of service.

A special sample analysis of the reasons for terminations showed that they were about equally divided between voluntary and involuntary terminations. Forty percent of those who terminated voluntarily did so to accept employment elsewhere. Of the "involuntary terminations", one-third were cases in which furloughed employees failed to protect their seniority by not responding to recall notices (probably because they had obtained other jobs), one-third resulted from disciplinary action by management, and one-fourth were dismissals resulting from application disapproval (e.g., failure to pass physical exams).

Finally, the degree of irregularity of railroad operating employment is shown by the number and proportion of employees who drew unemployment benefits under the provisions of the Railroad Unem-

ployment Insurance Act.* Benefits were paid to an average of 47,500 operating employees per year during the fiscal years 1955 through 1960. This represented 15 beneficiaries at some time during the year for each 100 qualified. Brakemen and firemen-helpers accounted for 86 percent of the beneficiaries; and half of these were under 35 years of age. The average annual duration of benefits for all operating employees who drew benefits was about 87 days, or nearly 3 months, and the average annual total of benefits drawn was \$504.

Railroad employees are also eligible for sickness benefits under the Railroad Unemployment Insurance Act and 11 of 100 qualified operating employees received such benefits during 1955-60. These went to older employees predominantly. The average annual duration per beneficiary was 73 days, and the average annual amount drawn was \$380. This combination of unemployment and sickness benefits, both in duration and amount drawn, compares very favorably with existing legislative protective provisions applying to workers in American industry generally. However, it should be noted that employees in some other industries have the additional protection of supplementary unemployment benefit (SUB) plans and that the President for some years has urged improvement and modernization of the Federal-State unemployment compensation system.

The Future of Railroad Operating Employment

As we have noted, nearly 261,000 operating employees worked on Class I railroads in the United States sometime during 1959. The average number of employees on the payroll each month was only 211,000, however, so it is apparent that there continued to be more operating employees attached to the industry than the average number of jobs available. Additionally, both the number of operating employees and the number of jobs have declined between 28 and 29 percent in the last decade. Will this rate of decline continue over the next decade, or will it be arrested? This question is one of those uppermost in the minds of railroad operating employees, and reflects a legitimate concern for security of employment and their future in the industry.

Unless the longrun trends in traffic volume can be reversed, the future of railroad employment is probably one of further decline.* Whether this decline can be reversed is dependent upon many variables, among which are possible changes in national transportation

* Benefits under the Act range from \$4.50 to \$10.20 per day, depending upon normal rate of pay, and are paid for 26 to 52 weeks, depending upon length of service.

* This view is similar to those expressed in the *Occupational Outlook Handbook*, (1961 ed.), Bureau of Labor Statistics, U.S. Department of Labor, Washington, D.C., pp. 707-8, and in *National Transportation Policy*, Report of the Committee on Commerce, U.S. Senate, by its Special Study Group on Transportation Policies in the United States, 87th Cong., 1st sess. (1961), pp. 58-82.

policy, and changes in methods and technology both in competing forms of transportation and in the railroad industry itself. Future prospects also depend on the ability of the railroads and their employees to give better service to the shipping and traveling public. Essential to better and more economical service is a more efficient utilization of manpower.

The recommendations made in this report envisage some further transitional reductions in the number of operating employees attached to the industry. This reduction should take place on a rational basis to achieve increased efficiency of railroad operations, with full consideration for the human and economic interests of the employees adversely affected. The employees who remain would, in our judgment, be assured of steadier year-round employment and earnings, and would find their skills more efficiently utilized on railroad jobs than they are today. If the reduction can be accomplished to meet these objectives, it might be that the overall decline in operating employment would only be short run. With more efficient operations resulting from better utilization of skilled manpower, along with other favorable developments, railroads might well be able to recapture some of their lost business. Railroad employees would then be able to obtain the benefits of expanding employment opportunities created by a growing population and an expanding economy.

We view the 1960's as a transitional decade, a period during which it will be possible to move to a more efficient level of railroad operations and of operating manpower utilization. However, railroad management and shippers, as well as the general public, must be aware of the human consequences of these changes. The protective and adjustment provisions recommended in later sections of this report are vital to successful accomplishment of effective manpower utilization during the transition period which lies ahead.

RECOMMENDATIONS

In the light of the preceding review of the manpower characteristics of railroad operating employees and the future of railroad operating employment, it is recommended that:

- 1. The Carriers and the labor Organizations should establish joint procedures on each carrier for periodic review of the manpower needs of the carrier in the light of the relevant manpower resources and characteristics.*

- 2. The parties should establish a procedure for joint review of existing seniority arrangements on each carrier property, with a view to broadening seniority districts in order to promote greater*

job protection for long-service employees, and to minimize the hiring of new men while other employees are separated from the payroll.

3. The parties should adopt a policy and develop procedures for a national hiring pool, to achieve more extensive use of the existing procedures established by the Railroad Retirement Board. Preferred consideration in new hires by each carrier should be given, first, to any employees deprived of employment for lack of work by the same carrier, and second, to any employees deprived of employment for lack of work by any other carrier.

4. In order to facilitate orderly adjustment to the declining manpower requirements for operating employees, the parties should negotiate a new national retirement rule, effective July 1, 1962,¹⁰ (a) that all operating employees who are 70 years of age or over should retire, except that no employee in the employ of the carrier shall by virtue of this new rule be required to retire sooner than July 1, 1963, and (b) that the mandatory retirement age shall thereafter be progressively lowered until it is 65, effective July 1, 1967, in accordance with the following schedule:

July 1, 1963—69 years of age

July 1, 1964—68 years of age

July 1, 1965—67 years of age

July 1, 1966—66 years of age

July 1, 1967—65 years of age

Furthermore, in order to encourage retirements of all employees over 65 prior to July 1, 1967, the parties should negotiate arrangements for supplementary retirement benefits for this group. The parties should also consider procedures for preretirement planning and counseling for other railroad operating employees. Existing agreements which provide for retirement at an earlier age than is here recommended should remain in full force and effect.

¹⁰This date is selected as the date by which the parties shall certainly have reached agreement, and is used in this sense throughout this report.

CHAPTER 4

The Use of Firemen-Helpers

The issue of the retention or the removal of the locomotive fireman-helper on road freight and yard diesel and electric locomotives is the most important of the manning issues before the Commission. It affects more than 30,000 railroad jobs and possibly as many as 45,000 railroad employees who work as firemen-helpers. The jobs of firemen in passenger service are not in dispute.

There have been firemen on locomotives on American railroads for more than a century. During the steam locomotive era, their principal work was directly related to the production of power to propel the locomotive. With the advent of the diesel locomotive, the traditional "firing" duties disappeared. Since 1937, however, a national rule has required the use of firemen on virtually all freight and yard diesel and electric locomotives, as well as on passenger locomotives.

The Proposals

The Carriers propose the elimination of all rules and practices requiring the employment of firemen-helpers on other than steam power in any class of freight or yard service.¹ They further propose that a new rule be established giving management the unrestricted right to determine when and if a fireman-helper should be used in both road freight and yard service.

The Organizations propose a new national rule requiring a minimum engine crew in all classes of service of not less than one engineer and one fireman-helper. This proposal would mean adding a fireman-helper in some types of operations, such as the multiple-unit electric trains used in commuter service, on which firemen are not required by existing rules.

Background

Diesel locomotives were first used in the United States in yard service during the 1920's and firemen were not assigned to them. Streamlined diesel passenger trains first came into use in the United

¹ The technical phrase, "other than steam power" includes all types of diesel-electric, electric, and other locomotives not propelled by steam. For simplicity in this report, the term "diesel" is used hereafter in this chapter to refer to "other than steam power" except where the context requires a more specific designation. The diesel is by far the most common type of locomotive power in use in the United States today.

States during the 1930's. Some carriers which had these new passenger diesels initially assigned firemen to them; other carriers did not do so until after protracted negotiations. In October 1936, the Brotherhood of Locomotive Firemen and Enginemen made a request of the Eastern, Western, and Southeastern Carriers' Conference Committees for a national rule requiring that firemen be assigned to all types of locomotives. In February 1937, the BLF&E and the Conference Committees reached an agreement known as the 1937 National Diesel Agreement. It provided that firemen-helpers would be assigned to all diesel electric, oil-electric, gas-electric, other internal combustion, or steam electric locomotives, on streamlined or mainline through passenger trains and in other classes of road and yard service. Single and multiple-unit electric trains (used in commuter service) were specifically excluded, as were locomotives weighing less than 90,000 pounds on the driving wheels. Nothing was said in the agreement about the duties of firemen on diesels. Although this agreement has been subjected to slight modification and clarification, it remains the basic rule in effect today.

When the national agreement was signed in 1937, few of the carriers involved had much experience with the use of diesels. Of the 9 railroads represented on the carriers' negotiating committee, 6 owned no diesels at the time, and several had extensive multiple-unit electric commuter service which they were anxious to have exempted from the operation of the national agreement. There were only 218 diesels as compared to 43,624 steam-locomotives in use on Class I railroads. At that time, dieselization was not a national phenomenon, and few people associated with the railroads expected diesels to supplant steam locomotives in the foreseeable future.

The diesel revolution spread so rapidly, however, that by 1948 the gross ton miles of freight hauled by diesels exceeded those hauled by steam locomotives. In 1959, when the Carriers served the present notice for a change in the 1937 national agreement, steam locomotives hauled only $\frac{1}{10}$ of 1 percent of the freight tonnage, while diesels hauled 97 percent. (Electric and other types of power accounted for the remainder.) By 1959, there were only 754 steam locomotives in use as compared to the 43,624 in 1937. In contrast, there were 28,163 diesels as compared to 218 in 1937. Thus, the dieselization of motive power on the railroads had almost completely eliminated the principal work that firemen had customarily done when they worked on steam locomotives.

This is not the first time that the Carriers have proposed on a national basis to eliminate firemen on diesels in road freight and yard operations. The effort was first made in 1956, but it was later withdrawn as a part of a "moratorium" on rules changes. At the

expiration of this moratorium, the Carriers served the present notices on the Organizations for the changes which are before the Commission, including that involving the firemen.

The basic question involved in this issue is whether the fireman-helper's job is so essential for the safe and efficient operation of diesels in road freight and yard operations as to require a national rule on the subject.

The Carriers assert that they are burdened with the employment of firemen who perform no useful or necessary functions. The Carriers state that firemen's duties vanished with the elimination of steam power; that firemen no longer have any distinctive duties and do not constitute a separate or distinguishable craft; that whatever firemen do of a useful character can and has been performed by other employees; and that firemen contribute little if anything to safety of railroad operations. They ask that they be given the right to determine whether firemen shall be assigned to engine crews. They assert that their interest in safety and efficiency will protect the interests of other employees and the public.

The Organizations, in contrast, emphasize the team aspect of road and yard operations and assert that the fireman is an essential part of this team. They argue that railroad operations can be made safe for the public and railroad employees only if there are sufficient men in a crew to look out for all hazards, perform every operation necessary to getting a train over the road, provide continuous communications, and share the work burden. The Organizations strongly emphasize the fireman-helper's mechanical duties in the maintenance of power and his contribution as a necessary left-hand lookout in both road freight and yard operations. They argue that the public nature of the service provided by railroads and the public interest in safe railroad operations require that railroad management not be permitted unilateral discretion in determining whether a fireman is needed.

Discussion

The testimony, argument and exhibits on the diesel fireman issue consumed more time in the hearings and filled more pages of the record than any other issue before the Commission. A review of this extensive record indicates that there are several major facets involved in determining the essentiality of the fireman-helper's role in the safe and efficient operation of diesels: (1) the lookout function in freight and yard service; (2) the mechanical function in freight and yard service; (3) relief of the engineer in both types of service; (4) the findings of other tribunals dealing with some aspects of the firemen's role; (5) foreign experience related to the issue; and (6) the essentiality of firemen as a future source of engineers.

1. *The Lookout Function*

In road freight diesels, the fireman-helper sits on the left-hand side of the locomotive cab and maintains a lookout on that side. In addition to the engineer who operates the controls on the right-hand side, there is always a head brakeman who rides in the locomotive. He usually sits in the cab, either between the engineer and the fireman or in a seat on the left-hand side behind the fireman.¹² In yard diesels, only two men, the engineer and the fireman, regularly ride in the cab. When the yard train is on transfer runs (a run between yards), however, a member of the ground crew frequently also rides in the cab.

Under existing operating rules, the lookout function is performed by all employees riding the locomotive. Each is required to call out signals, to look ahead on the right-of-way for objects or persons, and to look back over the train for any indications of equipment trouble, such as evidences of "hot boxes," or hazards involved in backing the train. In yard movements, the engineer is required to proceed slowly enough to stop short of any obstruction or opposing train movements, and to move the locomotive only if he has a signal from a member of the ground crew. Ground crewmen in yard movements, therefore, also perform important lookout functions, as do those employees who ride in the caboose in road freight movements or work on the ground in setting out or picking up cars en route. During the latter operation, the engineer proceeds only on signal from men on the ground, as in yards.

In freight service, a high percentage of the fireman-helper's time is spent in performing lookout functions. This is supported both by the 1958 and 1960 surveys of firemen's duties made by the Carriers, and the 1957 and 1960 surveys made by the Brotherhood of Locomotive Firemen and Enginemen. The Carrier surveys show that 91 percent of the freight fireman's time is spent in lookout duties, while the BLF&E surveys show about 80 percent similarly spent. As noted above, on road freight diesels, the head brakeman also performs similar lookout duties, frequently on the left side of the cab. In steam service the fireman was unable to perform this function a substantial proportion of the time, since his principal work was firing the locomotive.

The safety awards program initiated by the BLF&E in 1957 was relied upon by the Organizations to support the essentiality of the lookout (and to a certain extent, the mechanical) function of the fireman-helper's job. During the 43-month period through June 1961, there were 138 applications for safety awards involving the performance of lookout from the left side of the cab in freight service. This

¹² This is in contrast to the cab of passenger diesels, in which there are only two employees: the engineer on the right side and the fireman on the left.

is an average of a little over 3 such applications per month among an average of 16,000 freight firemen on duty. The applications for safety awards indicated a commendable alertness by the fireman-helper in freight service. It is difficult to say what would have happened in the cases cited if there had been no fireman on the left side. Note must be taken, however, of the fact that another member of the crew either occupied or could have occupied a lookout post on the left side of the cab.

In yard service, the fireman's function is almost exclusively that of a "lookout." The Carriers' surveys show that nearly 96 percent of his time is spent in maintaining lookout. (The Organizations' surveys did not cover yard service.) Part of the fireman-helper's function on yard diesels, the Organizations contend, is in passing signals to the engineer when the ground crew must work on the fireman's side. Although the evidence is conflicting, there appear to be very few occasions when signals must be passed on the left side from the ground crew and relayed by the fireman to the engineer. In the vast majority of cases, one or more members of the ground crew can position themselves on the engineer's side and pass signals directly to him. In some cases, this might involve some small delay, but slowing down the operation so that signals can be passed directly to the engineer from the ground should be within the area of managerial judgment. There are also a number of mechanical devices, such as mirrors, radios, and dual controls, that could be used or installed to facilitate the work.

Signal-passing, however, is not the only lookout function of the fireman on yard diesels. His role in maintaining a constant lookout from the left side for operating hazards is also emphasized by the Organizations. In the BLF&E safety award program, there were 139 applications for awards in which a yard fireman-helper claimed he averted accidents to other railroad employees, to trespassers, to his train, or to another train. Again, while this indicates a commendable alertness, the question is whether the presence of the fireman was essential to avert such accidents. There is no basis to conclude that other members of the crew could not have taken similar preventive action. Yard operations are usually slow; the engineer proceeds only when he has a signal, and must be prepared to stop short of any obstruction. Furthermore, as we noted earlier, on transfer runs, a member of the ground crew usually rides the yard diesel and can perform the same lookout function.

The performance of yard and switching operations without firemen is not hypothetical, for the record indicates that industrial switching by a number of private firms, the Armed Forces, and switching and terminal companies is performed safely and efficiently without the use of a fireman. Possibly these are not wholly comparable with

regular yard work. However, there was similar experience with yard diesels on the railroads which used them for yard work prior to the 1937 diesel agreement, although these accounted for only 2 percent of the total yard locomotive hours on Class I railroads in 1937. From that date, and even to the present time, a few yard locomotives weighing less than 90,000 pounds on drivers and on which no firemen are required have continued to be operated by a number of railroads.

The conclusion of this review of the fireman's lookout function is that it is not essential to the safe and efficient operation of road freight and yard diesels. On freight diesels, the fireman has no special qualifications to perform the lookout function as distinguished from other members of the crew. Therefore, he possesses no unique or traditional "craft right" to discharge this function. On yard diesels, his function in passing signals is minimal. In view of the slower nature of yard operations, which proceed under signals from members of the ground crew, the precautions taken by other members of the crew should suffice for the safety of men and equipment. The only exception to this conclusion is in those rare occasions when the yard engineer is disabled while the diesel is in motion. We shall consider this exception later under the section dealing with "relief of the engineer."

2. The Mechanical Function

The Organizations place considerable emphasis on the mechanical function performed by firemen "in the maintenance of power," especially on road freight diesels. This function consists principally of periodic patrols of the diesel units, answering alarms, and correcting malfunctions discovered either during these patrols or in answer to alarms. Considerably less emphasis was put on this function in yard work.

An evaluation of the importance of this function must be considered in the light of the Organizations' contention that the diesel is "a complex and intricate, troublesome mechanism, prone to malfunction and needful of constant attention." While few doubt that it is a "complex and intricate" piece of machinery, the relevant questions are whether it is generally "prone to malfunction," and if so, whether the fireman-helper has an essential or necessary function in this regard. The following considerations are relevant:

a. The fireman-helper cannot correct the vast majority of malfunctions which would cause a locomotive unit to be defective and removed from service. It is clear that such repairs must be made by skilled shop craftsmen. Diesels generally operate over long distances and for extended periods without major overhauling. Furthermore, under ICC regulations all road diesels are inspected at least once every 24

hours, yard diesels once each calendar day, and all receive major maintenance on a regular basis.

b. The time spent by the fireman-helper in answering alarms or in correcting malfunctions on freight diesels is a very small proportion of his total time on duty. In the Carriers' surveys, alarms occurred on less than 15 percent of all freight runs, and answering these required less than 1 percent of the firemen's time on duty. Routine inspections required less than 6 percent of their total time, and since a malfunction was discovered on the average only once during every five inspections, the time spent attempting to correct these malfunctions was about 1 percent of the total time on duty. The BLF&E surveys show higher proportions, but, even here, answering alarms required only 2.4 percent of the freight fireman's time. The time required per trip for handling malfunctions with alarms, as reported by the BLF&E surveys, increased with the number of diesel units in the locomotive consist. In minutes, the time varied from 3.2 minutes per trip for 1 unit to 23.9 minutes per trip for 6 units and over. The malfunctions reported per trip averaged nearly twice as many when there were 6 units and over as when there were 3 and under. These data are not related by the employees' exhibits to the total time on duty of the fireman, but the Commission's pay structure study shows that through freight engineers averaged 5.6 hours of work per trip during July-December 1960, converted through freight 8.5 hours, and local freight 10.2 hours. Obviously, the percentage of time spent in attempting to correct malfunctions even with a substantial number of units is a small fraction of the total hours on duty.

c. Locomotive malfunctions corrected by firemen are fairly minor. The Organizations' list of 63 electrical and 58 mechanical malfunctions which might occur on diesels included many which fireman-helper witnesses conceded that they were unable to explain or to correct. Most firemen now on diesel locomotives received no specific training in correcting electrical or mechanical malfunctions, and few railroads furnish them with any special-purpose tools to correct these malfunctions. Thus, their "craft skill" in maintaining locomotive power is a very limited one at most. A related fact is that on most railroads, after a few student trips (averaging about six), newly-hired firemen are considered qualified to work and receive the same pay as older, more experienced firemen. This point will be considered again in the discussion of the Organizations' training proposals.

d. If the fireman-helper were not available to make corrections for the few alarms or malfunctions which do occur, the locomotive engineer (who is skilled in the operation of the locomotive) would be able to correct some of them in the cab, as by resetting a tripped relay

switch by pressing a button. In other cases he might be required to stop the train and go back into the affected unit to make the necessary adjustments or to reduce power. As a consequence, there might be some delays, which the Carriers say they are willing to accept, but these would not be substantial because of the infrequency of malfunctions.

e. The fireman-helper also spends some time making running inspections of the diesel units while the train is in motion. These are normally simple and routine. Their necessity is not established, since alarms and malfunctions are infrequent and can be handled by the engineer in the absence of the fireman. The Carriers' surveys showed that the freight fireman spent an average of 24 minutes per trip making inspections, including the prerun inspection for which the engineer has primary responsibility. The Carriers pointed out that the two prerun inspections requiring two men could be made by shop or terminal personnel, or by other members of the train crew working with the engineer. The Organizations' surveys showed somewhat higher time per trip spent on inspections than did the Carrier surveys, but the amount claimed was higher than that observed on all but one or two of the trips made by the public members of the Commission. The Organizations also claimed that the detection of some malfunctions while the train is moving requires two men, in that the engineer has to be at the controls with the train under load, but there were no data to show how frequently such malfunctions occurred.

f. Inspections, answering alarms, and correction of malfunctions by firemen are very infrequent in yard service. Only the Carrier surveys distinguish between yard and road service, and they show that a total of 8 minutes, or an average of 1.7 percent of the fireman's time on duty in yard work, is spent in routine inspections. Alarms and malfunctions are even less frequent than on road freight diesels. To the extent that these must be handled, they can be done by the yard engineer while the engine is not in motion, which, according to the Carriers' surveys, is nearly one-fourth of the time on duty. Furthermore, mechanical forces are readily available in yards if any serious malfunctions occur. During the observation trips made by the public members, the number of times the firemen on yard engines and road switchers left their seats to make routine inspections was practically nil, and there were no malfunctions on any of these trips.

g. The safety aspect of the fireman-helper's mechanical duties is also emphasized by the Organizations. Malfunctions were involved in 32 of the safety award applications, but 18 of these were on passenger trains on which the fireman would be retained. Only 2 were in yard service. Twelve in freight service (occurring over 43 months)

were discovered by alarms, routine inspections, noticed first by third parties, or detected by sounds, heat, etc. The infrequency of these problems and the availability of other means of handling them, indicate that the fireman does not make an essential contribution to safety in connection with mechanical functions. It appears from the record that the durability of the diesel and periodic shop maintenance and overhaul, rather than the mechanical contributions of the fireman-helper en route, has helped to improve the industry's accident record. The number of casualties due to defective locomotives (which the presence of the fireman has not prevented) has declined slightly between 1956 and 1960. There has also been a fairly steady increase in locomotive miles per accident caused by defects in nonsteam locomotives during the postwar period, from 6.9 million miles per accident in 1945 to 15 million miles per accident in 1959.

h. The conclusion of this review of the mechanical duties now performed by firemen-helpers on road freight and yard diesels is that they involve a small proportion of the total time on duty, are relatively minor, and are not essential to safe operation. The infrequent minor malfunctions which do occur can be handled by the engineer. If they are more serious, the services of skilled maintenance personnel called to handle the emergency will still be required, as at present.

3. *Relief of the Engineer*

The Organizations maintain that a fireman-helper is necessary both for the temporary relief of the engineer and to take over the controls if the engineer is disabled by sudden illness or death on the job. Twenty-seven of the BLF&E safety award applications over 43 months were by firemen who relieved a disabled or dead engineer in road freight service, and 12 were in yard service.

When the engineer needs temporary or emergency relief, the locomotive can be stopped in road service with minimal delay in the absence of a fireman, and in yard service with practically no delay. In the event of an emergency created by the death or illness of the engineer in road freight service, any member of the train crew riding in the cab (such as the head brakeman) can easily stop the train. The infrequency of these instances cited in the safety award applications (less than 1 a month over the whole Nation) is not justification for retaining firemen-helpers permanently on road freight trains.

The possibility of engineer disability or death on yard diesels, with no other member of the crew riding in the cab to stop the train, is of more concern. Under such circumstances, accidents might have occurred in the 12 yard safety award application cases (about one every 3 months), unless yard diesels were equipped with "dead man

controls." Normally, yard diesels are not equipped with these foot pedals which the engineer's foot must keep depressed to avoid automatic stopping of the engine.

Since the protective provisions recommended in a later section for present firemen-helpers will give the Carriers adequate time for installation of these "dead man controls," it is reasonable to require that no yard diesels be operated without firemen unless they are so equipped. The recommendations below are subject to this requirement.

4. Findings of Other Tribunals

The firemen issue specifically before the Commission has not been considered by other emergency or arbitration boards appointed under the Railway Labor Act. However, three emergency boards and one arbitration board have considered Organization proposals to add additional engine crew members on grounds of safety or efficiency. These were uniformly rejected. For example, Emergency Board No. 70 rejected in 1949 the contention that safety considerations demanded an additional fireman to perform engine-room work on passenger trains which under the "watching rule" required that the fireman be in the cab at all times. The Board further noted that lookout functions in road freight service could be and regularly were performed by the head brakeman while the fireman was either present in or absent from the cab. Arbitration Board No. 140 dealing in 1954 with another aspect of the issue asserted that there was little need for the fireman on "watching rule" passenger trains to perform inspection or mechanical work in the engine room while the train was moving. The Board added that "in any event, such work is not exclusively that of a fireman."

5. Foreign Experience

Evidence of experience in other countries was introduced by the Carriers to support their case for the removal of the fireman-helper, but this was characterized by the Organizations as irrelevant to American employment standards and railroad operating characteristics. The fact that diesel and electric-powered freight and yard trains are operated safely and efficiently without firemen in most other countries cannot be ignored.

The Canadian situation is of special significance. After extensive hearings and inspection trips, a Royal Commission reported on December 18, 1957, that firemen were not needed on freight and yard diesels on the Canadian Pacific Railroad. Despite the Organizations' contention that even this experience should be disregarded, we cannot be unmindful of the Royal Commission's conclusions and the subsequent agreements which the BLF&E signed with the Canadian Pacific and

later with the Canadian National Railroad. There is interchangeability of trains at certain points in our common border with Canada, the operations are not greatly dissimilar (as European operations might be), the same labor organization represented Canadian firemen as in the present proceedings, and it reached agreements which should not be treated as irrelevant to this case. Finally, while the protective provisions incorporated in these agreements coupled with declining traffic have limited the number of yard and freight trips run without firemen since 1957, no accidents traceable to the absence of the fireman have occurred on these trips.

6. Future Source of Engineers

Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations. This fact does not in itself, however, compel the conclusion that the fireman's job should be retained. The engineer is a skilled and responsible operating employee, on whose shoulders rests the primary responsibility for the safe and efficient operation of the locomotive. Passenger firemen, who number over 6,000, would remain in any case, and be eligible for promotion to engineer positions on freight and yard diesels, as well as on passenger diesels.

To the extent that present firemen remain or are available for promotion as their seniority permits, there will be replacements for present engineers as attrition reduces their ranks. It is roughly estimated that 27,000 present firemen (over 45 percent of those attached to the industry) are firemen who had seniority dates as promoted engineers on January 1, 1961, although only about 8,000 of these received a substantial amount of engineer's work.

The problem of promotion ladders to the engineer's job in the event that there might at some time in the future be an insufficient number of qualified firemen for these engineer vacancies is also considered later in connection with a discussion of the Organizations' training proposals.

Conclusions

In the light of the preceding analysis, we conclude that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels. This conclusion does not preclude the occasional assignment of firemen-helpers on some of the road freight or yard runs which are atypical and which have unusual characteristics.

We emphasize this in order to make explicit the boundaries of our finding. It is, of course, impossible to say of the railroad systems

operating under an almost infinite variety of conditions that nowhere in the United States is there in operation a single run which requires the services of a fireman-helper to render it safe and efficient. However, both the testimony which we have heard and the observations which we have made in the field are convincing that such runs are rare. We can find no basis for recommending an appropriate national rule covering these unique situations.

This conclusion requires that we next consider what protective provisions and manpower adjustments are appropriate for approximately 45,000 firemen-helpers who fill more than 30,000 jobs on road freight and yard diesels.

Protective Provisions and Manpower Adjustments

In making our recommendations for protective provisions, we have been guided by the following considerations:

1. Protection of the type provided by the terms of the Washington Agreement of 1936 (applicable to mergers and consolidations affecting two or more railroads) would not be sufficient protection for many present long-service employees in fireman-helper's jobs. This protection is liberal compared to that in other industries, because it provides 60 percent of the employee's annual earnings (in the year preceding displacement) for 5 years.¹³ But applied to the present case, this would mean that at the end of 5 years, as many as 25,000-30,000 firemen-helpers would be left without further protection. The others would have been recalled to fill openings in engineers' jobs, or would have left railroad employment for normal reasons—resignations, retirements, and deaths. If other methods of encouraging firemen to retire or leave the job for other employment were included, the process would be speeded up somewhat, but would fail to take into account the important considerations which are stated below.

2. Protection which may be appropriate and even generous for employees of different occupations and skills when they are displaced by a merger or consolidation may not be adequate for members of one occupational group on whom the displacement falls exclusively, as in this case. The concentration of the impact on one group whose later job recall opportunities as firemen are largely eliminated is the unique feature of this problem.

3. The railroads have a different obligation to the older and longer service employees in an occupation so drastically affected (such as the fireman-helper) than to the younger and shorter

¹³ For details, and other conditions provided under ICC decisions, see the Commission's study, *History of and Experience Under Railroad Employee Protection Plans*, in Appendix Volume III.

service employees in that occupation. The members of the former group have devoted a much greater part of their lives to one occupation, are less mobile and are less likely to find alternative employment than the younger group.

More recognition needs to be given to the problems of this group of older workers than our society has normally given to employee displacement. It is for this reason that we believe that firemen-helpers who on July 1, 1962, will have had 10 or more years' seniority should retain and should be permitted to exercise the rights to which their seniority entitles them to jobs as firemen-helpers as provided in paragraph 9 of the Recommendations in this chapter. All firemen-helpers in this group will be required to protect vacancies: as engineers, in passenger service, or on other occasional runs to which the carriers assign firemen.

4. Provisions should be developed to encourage especially the younger group, but also members of the older group, to train for other occupations, to move to other railroad jobs, or to take outside employment without suffering a substantial loss of income during the protected period.

5. Employees in engine service jobs beyond certain age limits should be encouraged to retire earlier than is presently the case, in order to provide more opportunities for other present employees to move into engineers' jobs. In 1959, 2,350 firemen were 65 or over, and 7,850 engineers were 65 or over.

6. A protection or adjustment plan based on the above considerations needs to make a substantial initial impact in displacing within the first year those employees who can best adjust to the change: (1) the younger, shorter-service firemen, and (2) those who have reached what is often considered a normal retirement age. Thereafter, normal attrition can be expected within a decade to reduce the number of firemen-helpers on road and yard diesels to that required by passenger service. This is neither too long nor too short a period of adjustment of the manpower in one occupation affected so completely. As we have noted earlier, the decade of the 1960's should be regarded as a decade of adjustment in the railroad industry. The necessary changes cannot reasonably be expected to be accomplished in a shorter period of time.

7. In view of the above considerations, we do not favor a full attrition plan which would assure life-time employment to all firemen, regardless of age or length of service. It would not be in the interest of those younger employees who can be trained for other occupations and who can move to other jobs, to encourage their commitment to a lifetime of unessential work. It

would not be in the interest of the carriers who have a right to anticipate a more rapid adjustment to realistic manpower requirements. Finally, it would not serve the public interest in effective utilization of manpower in the operation of the Nation's railroads.

RECOMMENDATIONS

In order to effectuate the conclusions reached and the principles outlined above, it is recommended that the Carriers and the Organizations involved replace the 1937 National Diesel Agreement, as revised by the National Diesel Agreement of May 17, 1950, with a new national agreement which will include the following provisions:

- 1. After July 1, 1962, firemen-helpers need not be assigned to other than steam locomotives in freight and yard service, except as provided in paragraphs 4, 5, 6, and 9 below.*
- 2. After July 1, 1962, new firemen-helpers need not be hired to man road freight and yard diesels.*
- 3. Firemen-helpers and engineers shall be retired from active service in accordance with the provisions of the national retirement rule set forth in recommendation 4 of chapter 3.*
- 4. Firemen-helpers hired since the date of the Carriers' notice of November 2, 1959, may be separated from the carriers' payrolls 3 months after July 1, 1962. The protection afforded under paragraph 7 below shall apply only if these firemen-helpers were in active service at any time after April 1, 1962.*
- 5. All firemen-helpers under 25 years of age on July 1, 1962, and hired prior to November 2, 1959, may be separated from the carriers' payrolls 6 months after July 1, 1962. The protection afforded under paragraph 7 below shall apply only if these firemen-helpers were in active service at any time after January 1, 1962.*
- 6. All other firemen-helpers who on July 1, 1962, will have less than 10 years' seniority may be furloughed on or after July 1, 1963. Such firemen-helpers need not be assigned to other than steam locomotives in freight and yard service but shall retain existing rights and obligations to protect vacancies in passenger service and for promotion to engineer. The protection afforded under paragraph 7 below shall apply only if these firemen-helpers were in active service at any time after July 1, 1961.*
- 7. Firemen-helpers separated or furloughed under paragraphs 4, 5, or 6 shall if qualified be entitled to the schedule of allowances*

set forth in Section 7(a) of the Washington Agreement of 1936,¹⁴ without diminution due to earnings from any employment outside the railroad industry during the guarantee period applicable. To the extent that a fireman-helper is employed on another job in the railroad industry, the monthly allowances provided under this paragraph shall be reduced to the amount which, when added to the employee's monthly earnings, will produce not in excess of 100 percent of his average monthly compensation as a fireman-helper during the 12 months upon which his allowance is based.

8. In lieu of the allowances in paragraph 7, all employees covered by paragraphs 4, 5, or 6 may elect on or before the separation or furlough dates set forth in paragraphs 4, 5, or 6 to accept the lump sum separation allowances as provided in Section 9(a) of the Washington Agreement of 1936.¹⁵ Any employee electing a lump sum separation allowance shall be separated from the carriers' payrolls on the date when the lump sum allowances are paid.

9. The remainder of the firemen-helpers who are on the carriers' seniority lists on July 1, 1962, shall have the right to exercise their seniority to work their turn as firemen-helpers, to the extent that positions as firemen-helpers are available on any locomotives on

¹⁴ This provides, to the extent applicable to the present situation, a monthly allowance equivalent to sixty percent (60%) of the average monthly compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment (which, when applied to the present situation, means deprived of employment pursuant to the rule herein recommended). The allowance is determined in accordance with the following schedule:

Length of service	Period of payment
1 year and less than 2 years.....	6 months.
2 years and less than 3 years.....	12 months.
3 years and less than 5 years.....	18 months.
5 years and less than 10 years.....	36 months.

In the case of an employee with less than 1 year of service provision is made for an allowance in the form of a lump sum payment in an amount equivalent to sixty (60) days pay at the straight time daily rate of the past position held by him at the time he is deprived of employment.

¹⁵ This provides, to the extent applicable to the present situation, a separation allowance in accordance with the following schedule:

Length of service	Separation allowance
1 year and less than 2 years.....	3 months' pay.
2 years and less than 3 years.....	6 months' pay.
3 years and less than 5 years.....	9 months' pay.
5 years and less than 10 years.....	12 months' pay.

In the case of an employee with less than 1 year's service, provision is made for 5 days' pay, at the rate of the position last occupied, for each month in which he performed service, as the lump sum.

which firemen are presently assigned, until they reach the specified retirement ages in the proposed national retirement rule set forth in recommendation 4 of chapter 3 or in separation agreements. All firemen-helpers in this group should be required to protect vacancies: as engineers, in passenger service, or on other occasional runs to which the carriers assign firemen.

10. In addition to all other rights recommended for firemen-helpers in paragraphs 4, 5, and 6 above, for any such firemen-helpers, if qualified, who elect within 1 year from the date of their separation or furlough to prepare themselves for some other occupation for which training is available (of the type approved by the Veterans Administration under the Veterans' Readjustment Assistance Act of 1952), the carrier shall pay 75 percent of the tuition costs of such training for a period not exceeding 2 years. Whenever and to the extent that the United States Government makes provision for retraining out of public funds, the obligation of the carrier shall be reduced correspondingly.

11. All firemen-helpers separated or furloughed as a result of these recommendations shall be placed on a national roster which shall entitle them to the preferred hiring consideration specified in recommendation 3 of chapter 3.

12. No yard diesel may be operated without a fireman-helper unless it is equipped with a "dead man's control" or other appropriate safety device.

CHAPTER 5

Training of Engine-Service Employees

Proposal

The Organizations have proposed that a 4-year apprenticeship-type program, with specified hours of off-the-job classroom training in a number of subjects, be provided for firemen-helpers who aspire to qualify for engineers' jobs. The classroom training, at the expense of the Carriers, would supplement on-the-job training, the new fireman-helper would receive wages lower than the present basic rates for firemen-helpers, and there would be a progressive increase to the standard rate applicable to experienced firemen-helpers.

The Carriers did not reply extensively to this proposal, confining their presentation to the assertion that the job of the fireman-helper can be learned within a short period and does not require any formal training. On most railroads, a newly-hired fireman is considered qualified to serve on a yard or road diesel after 3 to 6 student trips. Progressive examinations for promotion to engineer are provided, and these together with on-the-job training are considered by the Carriers as adequate for training future engineers.

Discussion

There is no present apprenticeship program of the type proposed by the Organizations on any railroad in the United States (except among the railroad shop crafts). The job requirements for fireman-helper are not sufficient to justify such an extensive training program. The small number of student trips required of applicants for firemen-helpers jobs before they are qualified to run as firemen-helpers at regular rates of pay supports this conclusion.

Firemen-helpers generally serve about 3 years before they are eligible for promotion to engineers. Less than 5 percent fail to pass the qualifying examinations which are prerequisite to this promotion; those who fail are separated from the railroad.

In view of the recommendations we have made on the issue of firemen-helpers on road freight and yard diesels, including the retention of those with 10 years or more seniority, there is no immediate need for the type of apprenticeship program proposed by the Organizations. The present qualifications and on-the-job experience of the

firemen-helpers with 10 years or more seniority seem entirely adequate to meet needs for engineers for the next several years, at least. In fact, a large number of these senior firemen are already "promoted engineers."

Since new firemen-helpers may later be hired, there is reason for considering a planned training program to enable these new firemen to qualify themselves more rapidly for engineer's jobs in all classes of service. The specific form such a training program should take need not be prescribed here; it can be better developed in subsequent discussion between the Carriers and the Organizations representing engine service employees. It should include some off-the-job instruction in the operation and functioning of diesel engines or other forms of motor power.

RECOMMENDATIONS

For the reasons discussed above it is recommended that a joint committee should be established composed of representatives of the Carriers and the Organizations representing engine service employees. This committee would consider the development of a training program which would adequately meet the long run need for future trained engineers.

CHAPTER 6

Consist of Crews

In addition to the question of the use of firemen-helpers in freight and yard assignments, there are two other manning or crew complement issues before the Commission. The first of these relates to the train crew consist—principally road brakemen and yard helpers—used in road and yard operations. The second deals with the use of operating employees on motor cars and self-propelled vehicles which are used in connection with construction, maintenance, inspection, and related types of work.

The specific issues with respect to road and yard crews in other than engine service are whether existing rules and practices have brought about situations in which too few or too many train service employees are assigned to certain crews, and whether the appropriate size of any or all crews should be determined by the carriers alone or through negotiation with the representatives of the affected employees. On the self-propelled machine question the basic issue is whether operating employees—either engine or train service, or both—should be assigned to vehicles of a special-purpose variety which are manned by other railroad employees.

I. Road and Yard Crews (Other Than Engine Service)

The Proposals

The Carriers propose the elimination of all existing agreements, rules, regulations, and practices, however established, applicable to the consist of crews in road or yard service which require (1) a stipulated number of trainmen or more than one conductor in any crew used in any class of road service, (2) a stipulated number of brakemen or helpers or more than one conductor or foreman in any crew used in any class of yard, transfer, or belt line service, or (3) a conductor or trainman in connection with the movement of light engines or in pusher or helper service, or an engineer, conductor or trainman in pilot service. They also propose to establish rules which will give management the unrestricted right, under any and all circumstances, to determine the size of the crew to be used.

The Organizations, on the other hand, propose to establish national rules or agreements which will require (exclusive of their proposals with respect to engine service) :

(1) That crews in all classes of road train service shall consist of not less than 1 conductor and 2 trainmen;

(2) That train and yard crews in yard, belt line and transfer service shall consist of not less than 1 conductor (foreman) and 2 brakemen (helpers);

and, as to each such category "such additional employees as are required to assure maximum safety."

Discussion

Unlike the situation with respect to the 1937 National Diesel Agreement relating to the use of firemen on diesel locomotives, there exists no "national rule" with respect to other aspects of the consist of crews in train and engine service. There is, instead, a complex of rules, some systemwide and some local; there are so-called "practices", which in many instances have the effect of rules; there are laws and regulations in some States; and there are some situations, involving a relatively few carriers, in which there are no rules or practices, with the result that these carriers, unless subject to State laws or regulations, are technically free to make their own determinations of crew consist. The various rules, regulations, and practices may be summarized as follows:

1. *Passenger Service.* Existing rules and practices call for crews consisting of a conductor and 1 to 5 train-service men, identified variously as assistant conductors, ticket collectors, trainmen, brakemen, flagmen, or baggagemen.

2. *Through Freight Service.* Existing rules and practices call for crews consisting of a conductor and 1 to 3 or more brakemen. The most typical crew consists of a conductor and 2 brakemen.

3. *Local Freight Service.* Existing rules and practices call for crews consisting of a conductor and 2, 3, or more brakemen.

4. *Yard Service.* Existing rules and practices typically call for a crew consisting of 1 foreman and 2 helpers. There are, however, variations up and down.

5. *Miscellaneous Service.* Miscellaneous services, such as mine run, road switcher or roustabout, and work, wreck, or construction service, operate under rules or practices which typically require 1 conductor and 2 brakemen. In some instances, 3 brakemen are required.

Sixteen States have laws specifically establishing crew consist minima for train and engine service; 7 additional States empower

regulatory commissions to impose minima, and 3 have done so. These laws and regulations vary widely. Some require a minimum number in the crew, regardless of the length of the train; others make the minimum consist dependent upon the composition of the train, a standard which is likewise variable among the States. With two exceptions all these laws were enacted before 1920. There is no Federal law with respect to crew consist.

Most of the rules, regulations, and practices relating to crew consist were formulated or developed more than 30 years ago; indeed, some go back to the latter part of the 19th century. The rules, regulations, and practices have tended to remain static, although there have been some negotiated changes. ICC data indicate relatively little change in the average number of train service employees per crew between the 1922-26 period and 1960, although some reduction has occurred in the aggregate number of trainmen per conductor in road freight and yard service. In only two prior instances (1946 and 1956) have the Carriers or the Organizations made the subject of crew consist a matter of concerted national handling, and in neither instance was a recommendation made by the designated emergency board.

Outside the railroad industry, it is generally considered to be a function of management to determine the size and composition of the work force. Yet there are some significant exceptions in the airlines, maritime, construction, and printing industries, among others. Moreover, some agreements permit employees or their union representative to challenge crew size, normally through the established grievance procedure, on grounds of alleged safety hazards or undue workload. The matter of crew size is commonly a subject of grievance procedure or negotiation in connection with the operation of some kinds of incentive plans. The ratio of helpers to skilled craftsmen is frequently the subject of agreement, as is the number of employees to be admitted to apprenticeship. Production standards are not infrequently the subject of grievance procedure or negotiation in manufacturing industry; the question of production standards indirectly may involve the number of men to be used in particular operations.

The basic question posed is whether the Carriers should have greater freedom in the determination of crew consist than they now have. The Organizations' proposals contemplate, essentially, the preservation, on a national basis, of the effect of existing rules, regulations, and practices, except as they are changed by mutual agreement. Changes in crew consist rules generally require collective bargaining. Most carriers may not proceed unilaterally to reduce the size of crews.

The answer to this basic question requires a consideration of two subsidiary questions: *First*, whether existing rules, regulations, and practices require the use of unneeded manpower; *second*, whether, in

any event, existing procedures for determining the consist of crews should be revised to provide somewhat greater flexibility in making determinations.

(a) *The Question Whether Existing Rules, Regulations, and Practices Require the Use of Unneeded Manpower.* Considerable evidence appears in the record on this question although much of it is "opinion" and very little of it is of direct probative value. It is established that those few carriers which are not subject to crew consist rules and practices have crews somewhat smaller on the average than those carriers subject to such rules and practices. This suggests, although it does not conclusively prove, that the latter are to some extent subject to excess manning requirements. More persuasive is the fact that there are varying crew consists in road service on trains operated under similar conditions, as they pass from States having no "full crew" laws into States having such laws. This is inferential evidence that the parties themselves consider that the difference in manpower requirements is not always warranted.)

There is no doubt that certain technological, operational, and traffic changes have tended to reduce the actual workload of employees in some classes or kinds of service. Among such changes may be cited the virtual disappearance of l.c.l. (less-than-carload-lot) freight, the reduction in the amount of local switching, diminution of passenger service, reduction of the train crew's paper work, the virtual elimination of "doubling hills" and of helper service, Centralized Traffic Control, the use of the radio-telephone, improvements leading to the detection and reduction of "hot boxes," improvements in braking and signal systems, and modernization of classification yards.

There is, however, some basis for the view of the Organizations that "job content" has tended to increase because of such factors as increased length of freight trains and attendant increases in responsibilities. The Organizations make the point that in both road and yard service a "team" operation is involved, and certainly a fully adequate team is important to the safety and efficiency of the operation, given the workload and responsibilities of each member of the crew. Moreover, the Organizations contend that Carriers in recent years have tended to tighten the enforcement of operating rules, and that this indicates that these jobs are more demanding than was previously the case.

In their evidence and arguments, the parties devoted considerable attention to the matter of safety of operations. Undoubtedly, safety has been enhanced by the introduction of numerous technological changes, although there is considerable variation among railroads in the extent to which the technical and mechanical improvements now available have actually been introduced. The Carriers emphasize

the general downward trend of casualties resulting from train and train service accidents. The Organizations argue, however, that many accidents have been averted that would otherwise have occurred had crew sizes been smaller. There may well have been some such cases, although the evidence does not establish that the number has been substantial, and this is an area not subject to statistical evaluation.

The record does not clearly establish the extent of crew reduction which would occur if the Carrier had a "free hand," and hence the extent of over-manning which, from the Carriers' point of view, exists. The Carriers' evidence suggests that road and yard crews would be reduced by some 19,000 employees, which is approximately 22 percent of all trainmen and yard helpers (exclusive of conductors and yard foremen) in all classes of service, or an average of $\frac{1}{2}$ man per crew. One Carrier witness expressed the opinion that, even if his railroad were free of consist regulations, "Not very many freight trains or yards crews would be operated with a crew consisting of less than an engineman, a conductor, and two trainmen." Yet another Carrier witness stated that if he had a free hand he could reduce his crews by an average of one brakeman. The variation in managerial judgment reflected in these estimates demonstrates differences of opinion concerning the minimum crew consist required for safe and efficient operations, even under similar operating conditions.

From the array of evidence, opinion, argument, and other information available to the Commission, including the observations made by the public members on their "field" trips, we conclude (a) that there is *some* overmanning in road and yard service, under existing rules, regulations, and practices, but little undermanning; (b) that neither the amount of any overmanning or undermanning nor the precise circumstances in which they exist can be determined in this proceeding; and (c) that the extent of overmanning, while probably substantially less than estimated by the carriers, may nevertheless be a more significant problem for some railroads than for others. It appears that under present operating conditions the most typical and generally accepted crew consist, outside of passenger service, is a conductor (foreman) and 2 brakemen (helpers). An analysis of operations so manned, as compared with any proposal for a change in the consist of any crew of different size, should be useful in judging the merits of any specific proposal.

(b) *The Question Whether Existing Procedures for Determining Crew Consist Should be Revised.* The fundamental question before us is whether existing procedures (i.e., those of collective bargaining) are adequate to meet any crew consist problem which exists. The Carriers believe that these procedures are unsound in principle and inadequate as shown by experience. They consider that the determina-

tion of crew consist is a basic managerial function, which has been lost through legislation and collective bargaining, and should now be restored. They contend that the necessity of negotiating changes in crew consist rules and practices has meant, in effect, that the Organizations have had a virtual "veto" power, thus making necessary or desirable changes either impossible or unduly difficult to achieve.

The Organizations, on the other hand, believe that the collective bargaining process as hitherto employed with respect to crew consist issues is sound both in principle and in the light of its long history in the railroad industry, and that it is adequate to meet any real problems which may exist. They say that in proper instances changes have been negotiated, and that this process will continue. They regard any withdrawal of this issue from the area of free collective bargaining as retrogressive.

In this industry, whatever may be said of others, the employees have a legitimate collective bargaining interest in the matter of crew consist, and it is our view that the collective bargaining process should remain the basic method for resolving disputes concerning this matter. On the other hand, we believe that in this area, as a certain others which are before the Commission, the parties should evolve a procedure which will insure an expedited collective bargaining process and an expedited method of final determination, through arbitration, of unresolved disputes where collective bargaining fails to produce agreement. Such procedures will, in our judgment, serve to safeguard the parties' respective interests and at the same time promote the public interest by introducing into railroad operations a somewhat greater degree of flexibility and efficiency.

It is obvious from the foregoing that we do not consider that the Carriers should have the unlimited discretion which their proposals contemplate. Nor do we believe there should be negotiated a "national rule" freezing minimum crew consists as proposed by the Organizations. Our recommendations, which follow, envisage a preservation of the principle of collective bargaining in this area, but contemplate the adoption of supplementary procedures which will provide for final determination of crew consist disputes. Each party should remain free, as in the past, to press upon the other in collective bargaining whatever considerations it deems relevant. However, if bargaining fails to produce agreement, and a dispute is then submitted for arbitral determination, we think it appropriate that the issue be determined in the light of the following criteria: (1) the adequacy of the crew consist, whether existing or proposed, in terms of the safety of the operation; and (2) whether the proposed crew consist will impose an unduly burdensome workload on the members of the crew, or is necessary in order to avoid such workload.

RECOMMENDATIONS

In light of the foregoing it is recommended that the parties negotiate a rule with respect to the consist of road and yard service crews which will incorporate the following:

1. Provision should be made that, during a specified period (such as 3 months) following the adoption of the rule, and not more often than once yearly thereafter, any carrier or any organization may conduct a survey for the purpose of determining what changes in crew consist it wishes to propose. Reasonable written notice (such as 15 days) shall be given of any such proposal. Following such notice period, the carriers and all organizations having bargaining rights with respect to employees involved shall thereupon engage in joint negotiations on the changes proposed.

2. Provision should be made for a negotiating period of not to exceed sixty (60) days from the expiration date of the notice period. If agreement has not been reached during this 60-day period, the matter may be submitted by either party for final and binding determination, in a single proceeding consolidating all proposals at issue, by a special tribunal.¹⁴ The tribunal should be authorized, in its discretion, to permit or direct the carrier to place in effect a particular proposal for a limited period pending final determination of the issue, for the purpose of obtaining information not otherwise available for the appropriate resolution of the dispute. The criteria for determination of a dispute by such tribunal shall be the following:

(1) The adequacy or necessity of the proposed crew consist in terms of the safety of the operations; and

(2) whether the proposed crew consist will impose an unreasonably burdensome or onerous workload on the members of the crew, or is necessary to avoid such workload.

In any such submission to the special tribunal, the burden of proof shall be upon the party proposing the change. Pending action by the special arbitration tribunal, there shall be no change in crew consists except by mutual agreement.

3. A crew consist issue raised and disposed of in accordance with the above procedures shall not be reopened for at least one

¹⁴This tribunal should be established on a national basis and should consist of neutral or neutrals selected in such manner as the parties shall determine. Procedures should be developed and sufficient personnel selected to insure the expeditious handling of disputes. The fees and other expenses of the tribunal should be borne by the parties.

year, except that the carrier shall have the right to increase the consist of any crew.

4. The rule should provide that the aggregate reductions in crew consist pursuant to this rule by any carrier in any seniority district during any yearly period subsequent to the adoption of this rule shall not exceed some small percentage of all the directly affected operating employees actively employed by the carrier at the beginning of the year in such seniority district.

5. The rule should incorporate the following protective conditions applicable to employees furloughed as the immediate and proximate consequence of the application of the rule: Employees who qualify for and receive unemployment benefits under the Railroad Unemployment Insurance Act shall be guaranteed by the employing carrier additional unemployment benefits, payable following the period of benefits to which the employee would be entitled under said Act, in like amount for another such period.

6. This rule should not be subject to reopening for at least 5 years.

II. Manning of Motor Cars and Self-Propelled Machines

The Proposals

The Carriers propose to eliminate all existing rules, agreements, regulations, interpretations, and practices, however established, that require the use of engine, train, or yard service employees on (or in connection with the operation or use of) any motorcar or self-propelled vehicle or machine used in maintenance, repair, or construction or inspection work. They further propose that they be given the unrestricted right to determine when and if any of such classes of employees shall be so used.

The Organizations propose to retain existing rules and practices with regard to the use of operating employees in connection with the manning or use of such vehicles or machines.

Discussion

Numerous types of vehicles and machines are comprehended by the Carriers' proposal. The Carriers classify them into four general categories, and list "representative machines" in each category, as follows:

1. On-the-track machines that can be moved as units in a train, being equipped with standard couplers and standard air brakes, and that can be used to move freight cars. Typical of such equipment are locomotive cranes

ditchers, clamshells, pile drivers, wrecking derricks, and Sperry rail detector cars.

2. On-the-track machines that cannot be moved as units in a train, because not equipped with standard couplers and standard air brakes, but which have non-standard couplers and sufficient power to move freight cars. Such machines include burro cranes and other light cranes.

3. All other on-the-track machines which cannot be moved as units in a train and which are not capable of moving freight cars. Included in this group are scarifiers, weed burners, ballast agitators, light rail detectors, track rollers, welders, compressors, discers, track shifters, weed mowers and motor cars.

4. All "off-the-track" equipment such as steam rollers, caterpillar or crawler equipment, motor trucks, etc.

Some types of self-propelled equipment were used on American railroads as early as 1899, but their use has increased steadily as the number and kinds of such machines have increased. Some types of machines and equipment, especially those used in maintenance-of-way work, are unique to the industry and represent very substantial advances in the technology of railroad maintenance. Some of these vehicles and machines are equipped with drawbars and couplers, and have sufficient tractive power to pull other cars or equipment; others are not so equipped.

The evidence shows that, during the early years of the use of vehicles and equipment of any of these types, they were manned exclusively by the employees engaged to perform the class of work for which the machines were designed (e.g., maintenance-of-way or shop craft), and that engine, train, and yard service employees made no claims of manning rights on or in connection with the use of such machines. Beginning with the World War I-period of Federal control of the railroads, and increasingly thereafter, especially since 1934, such claims have been made, and in numerous instances have been supported on varying theories by decisions of the National Railroad Adjustment Board. The principles underlying some of these decisions have been overruled in recent years, but meanwhile many carriers had adopted rules, or negotiated special agreements (characterized by the Carriers as "escape agreements") embodying manning requirements on principles laid down in the earlier decisions. Six States have legislation requiring the use of train or engine personnel on some types of self-propelled equipment under certain or all circumstances.

Existing rules, interpretations, and practices requiring the use of such personnel on these vehicles and machines are highly diverse. On rail detector cars, for example, from one to four train or engine service employees are required to be used. This, of course, is in addition to the technical crew. Certain railroads are required to use engineers on weed burners and locomotive cranes, while other railroads are permitted to operate them without engineers. Some railroads are

subject to requirements for use of operating craft personnel on many types of self-propelled machines and equipment, while others are subject to few if any such requirements. Different carriers are thus required to use varying numbers of operating employees on identical kinds of equipment.

The parties disagree concerning the extent to which operating craft personnel perform any useful or needed functions in connection with the operation or movement of these kinds of equipment. The Carriers point out that the machines, in performing the functions for which they are designed, are operated by shop craft or other personnel whose job duties encompass these functions, and they claim that operating craft personnel are not needed to move such equipment, or to perform any necessary function connected with such movement. They say that the movement of equipment is or can be fully protected without the necessity of the use of operating craft employees and that, to the extent these employees perform any work at all, it is for the most part duplicative of the work of other employees who must be assigned to such work. They say that in some instances, carriers even elect to keep assigned operating craft personnel at the depot, and pay them for completely idle time, rather than have them accompany the vehicle or machine.

The Organizations contend that operating craft personnel perform necessary and useful functions, especially in main-line movements, and even in yard movements, to insure conformance with standards of safety of operation. Their general position is that: "... if work is performed in the operation and movement of self-propelled equipment which falls under the scope and duties of operating employees such as supervision, observation, inspection, protection, handling switches, handling cars, receiving train orders and the observance of them, flagging and their many other duties, then the operating employees are entitled to the work."

The problem presented with respect to this issue derives in substantial part from the fact that many of the self-propelled machines to which the Carriers refer are used to perform maintenance-of-way repair and other maintenance work in connection with which so-called "work trains" have traditionally been (and in many instances continue to be) used. Such "work trains" are subject to the crew consist rules, regulations, and practices generally prevailing, and are not encompassed by the Carriers' proposal with respect to self-propelled machines. To a substantial degree the Organizations' opposition to the Carriers' proposal arises out of the belief that in many instances the Carriers use (or would use) self-propelled machines in what amounts to a "work train" kind of operation. It is a fact that some of these machines have sufficient tractive power to pull other cars, and,

in some instances, do so (although, according to the Carriers, these are primarily cars containing materials to be used in the performance of the very work for which the self-propelled machine is assigned).

The issue of the employment of operating craft personnel on motor cars or other self-propelled machines has been considered by two emergency boards. Each board, while characterizing the situation as "intolerable" or "deplorable", treated the matter as beyond its province on the ground that it was, essentially, a "jurisdictional" controversy between the operating and nonoperating crafts.

We have concluded from the entire record that the Carriers have shown that there is no justification, in general, for the employment of personnel of the operating crafts on or in connection with the operation of the self-propelled vehicles or machines in question, and that, in general, the Carriers should have discretion to determine whether or not to use such personnel. We believe, however, that under some circumstances and conditions, operating craft personnel have a useful and necessary function to perform, and can properly claim to have some manning rights consistent with their normal craft jurisdiction. We think that suitable criteria can and should be established for the identification of those circumstances and conditions in which operating craft personnel should continue to be used.

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties negotiate a rule which will eliminate existing rules, agreements, regulations, interpretations, and practices, however established, which require the use of engine, train, or yard service employees on or in connection with the operation or use of any motor car or self-propelled vehicle or machine used in maintenance, repair, construction, or inspection work except where such vehicle or machine is used to provide motive power to move or switch other cars, vehicles, or machines (other than a maximum of two such other cars or vehicles used exclusively in hauling material to be used in connection with the work to which the vehicle or self-propelled machine is assigned). This rule should not be subject to reopening for at least 5 years.

III. Crew Consist Laws and Regulations

It is obvious, of course, that the ability of the Carriers, whether acting unilaterally or otherwise, to affect changes in crew consist will be limited by applicable State crew consist laws or regulations, as long as such laws and regulations continue to exist. As noted above,

most of the legislation of this kind was enacted prior to 1920. These laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that there will be difficulty in applying the rule recommended by us in States where "full crew" laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge.

RECOMMENDATIONS

The Commission believes that the existing laws and regulations governing the operation of railroads are in many respects obsolete and that they should be revised to reflect the conditions of modern railroad operation. The Commission believes that the following recommendations should be adopted:

1. That the Federal Railroad Administration be created as a permanent agency within the Department of Commerce, to be charged with the duty of supervising the operation of railroads and of enforcing the laws and regulations governing the same.

2. That the Federal Railroad Administration be authorized to make and enforce rules and regulations governing the operation of railroads, subject to the approval of the President.

3. That the Federal Railroad Administration be authorized to conduct investigations and to make reports to the President on the operation of railroads.

4. That the Federal Railroad Administration be authorized to collect and disseminate information concerning the operation of railroads.

5. That the Federal Railroad Administration be authorized to conduct research and to make reports to the President on the operation of railroads.

6. That the Federal Railroad Administration be authorized to conduct research and to make reports to the President on the operation of railroads.

7. That the Federal Railroad Administration be authorized to conduct research and to make reports to the President on the operation of railroads.

8. That the Federal Railroad Administration be authorized to conduct research and to make reports to the President on the operation of railroads.

9. That the Federal Railroad Administration be authorized to conduct research and to make reports to the President on the operation of railroads.

10. That the Federal Railroad Administration be authorized to conduct research and to make reports to the President on the operation of railroads.

CHAPTER 1

Technological Progress and Employee Security

That a machine is introduced which enables one man to perform a job previously performed by ten, it is not necessary the job itself is any longer work. It may not actually be reduced or even eliminated. It may produce more or even be even a hardship. But these objections may be answered that, not only that the

machine of automation and automation, and not only the introduction of displacement and social unemployment. It is not the machine itself which is the problem. It is the way it is used.

Part III

TECHNOLOGICAL CHANGE

When the machine of automation and automation, and not only the introduction of displacement and social unemployment. It is not the machine itself which is the problem. It is the way it is used.

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CHAPTER 7

Technological Progress and Employee Security

When a machine is invented which enables one man to perform a task previously performed by ten, it is easy to perceive the plight of the nine displaced workers. They may suddenly be deprived of opportunity to lead productive lives, or even to earn a livelihood. That these deprivations may be temporary does not mean that the problem is not acute.

In an age of exploding technology, we would like to obtain the benefits of mechanization and automation and yet mitigate the consequences of displacement and avoid unemployment. No one has yet paved a wide avenue leading to such goals. Impatient with this state of frustration, some have abandoned their faith in the beneficence of so-called industrial progress and would tie industry down to the current technology. Others would shrink the working day so as to convert the savings of technological advance wholly into paid-for leisure for the affected employees. Still other would pursue a laissez-faire policy, and permit the competitive forces of the market place to have unrestrained effect upon industry and workers; if some are hurt in the process, this would be shrugged off as the price of the benefits of a free enterprise system.

Those who inspect the problem from the point of view of the general rather than any special interest are not content with any of these responses. They believe that it is neither possible nor desirable to contain and muffle the thunder of the technological explosion whose rockets are lighting the sky all about. Technological progress, moreover, is decidedly in the general interest.

Nor do they regard it as desirable to convert all the directly saved manpower into leisure for the affected employees. This would deprive the community, which needs greater production and investment, of benefit from the change, and would neutralize the incentive to industry to develop new machines and equipment.

They cannot either in good conscience or in the general interest agree that the human consequences of progress should be shrugged off. Refusal to face this question would in fact set in motion forces that would slow down progress.

It is now more than 200 years since the Industrial Revolution began. It is exactly 199 years since the year James Watt developed the separate condenser which became the basis for the steam engine. It is time that we found a more adequate approach to the problem of matching human security with advancing technology. To do this will involve questions of public policy as well as private bargaining. The sooner these problems are met and anxiety over them quieted, the sooner we can step up the pace of advancing technology and achieve its benefits.

Technological change has many aspects and many effects, both direct and indirect. The direct effect of technological change on the railroad industry is illustrated by the employment drop that occurs in a freight yard when automatic retarders are installed. An indirect effect may be the centralization of train classification work in a technologically-advanced yard, and the elimination of other yards. The diesel was a technological innovation which affected, directly or indirectly, maintenance shops, engine size, train lengths, and the number of crew members needed to handle a given tonnage.

There is before the Commission the broad question of the relationship between technological progress and worker security, as it affects the railroads and their operating employees in general, apart from the specific issues which are considered elsewhere in this report.

The Proposals

The Organizations propose that operating employees affected by a wide variety of changes be provided a greater degree of job security. Under the heading, "Financial and other protection", their proposals extend:

In all instances in which the Washington Agreement of May, 1936, is not applicable, to all mergers, consolidations, unifications, or abandonments of facilities, or technological changes in operations, or changes in home terminals, home locations or other rearrangements or changes in operations or employee assignments, designed to or resulting in reduction of forces, displacement, loss of compensation or changed working conditions (hereinafter referred to as "effected change"), whether on any one carrier or more than one carrier.

The protection proposed is threefold:

(a) Limiting reductions in numbers of employees to normal attrition, but not to exceed annually more than 5 percent of the June 1960 employment.

(b) Five years' income protection in the form of a monthly "displacement allowance" for employees affected within 5 years of the date of the change by any of the changes set forth above; the allowance would be set at the level of earnings during the

highest year of the last 5 years, and would extend for a 5-year period.

(c) Reimbursement for all expenses of moving households, traveling to new job locations, wage loss during transfer, and loss of home value.

In addition, under the heading, "Stabilization of employment", the Organizations propose guaranteed annual employment in the following terms:

An employee who has had compensated service in eight (8) or more months in any calendar year, and compensated service on the same railway (or predecessor railway) in any five (5) of the preceding ten (10) years shall be guaranteed twelve (12) months' employment in the succeeding year, with payment in each month of that succeeding year of not less than the monthly guarantee applicable to the class of service in which the employee holds seniority; providing, that this guarantee shall not apply to employees who resign voluntarily.

Discussion

Technological change and adjustment to change are not new in this industry. Railroad service was born out of a technological breakthrough: the marriage of a steam engine to a carriage on rails.

Over the decades through the First World War, improvements increased the capacity of railroads impressively. During most of this period the railroads afforded an expanding employment market so that the employees and their organizations had little occasion to be alarmed by technological advance as a threat to job security.

But with the end of the 1920's, this favorable climate for introducing technological change began to dissipate. The major technological change in the industry—dieselization—was introduced contemporaneously with the growing challenge of trucks and buses, and with the onset of the depression of the 1930's.

Dieselization was the most striking of many changes that had taken place in the industry. Trains of great length and weight could be hauled at greater sustained speeds than ever before. Potentially, diesel power meant that a single crew could handle a 800-car train whereas previously it might have taken 4 crews to handle four 75-car trains.

After World War II, diesel power became fairly common on American railroads at the very same time that motortrucks, buses, automobiles, airplanes, and pipelines were rapidly challenging the railroads for an ever larger percentage of the dollar spent on transport. Under the combined impact of technological advances and competitive encroachment, railroad employment began a rapid decline. In 1946

railroad employment stood at about one and one-third million. In 1960 it stood at less than 800,000, 60 percent of the 1946 figure.

It was inevitable that such a development would bring about a more critical appraisal by employees of the presumed benefits of technological progress. Even a long tradition of hospitality to industrial improvements will require reassurance if it is to overcome the inevitable anxiety about job security.

It is clear from the Commission's record that disagreements over job security, seniority arrangements, and working conditions have impeded the full realization of technological improvements. Some of the issues before the Commission, such as the fireman issue, reflect the failure of the parties to negotiate mutually satisfactory arrangements surrounding a major technological change. Even were this issue to be settled, the parties would still be without rules for settling future disputes arising out of technological change. This situation in itself would ensure a continued drag on progress in the industry.

The Organizations' proposals deal exclusively with the protection of the employee's job and income in the event of technological or other change. They are all-embracing both in coverage and scope. They would protect against all kinds of change, including those arising from the business cycle and competitive loss of business. They would provide a freeze on jobs for all present employees, guaranteed full-time annual employment for most employees, and income protection.

These proposals would be applicable both where management now has the unqualified right to introduce technological change and where management must negotiate prior to a change because seniority, working conditions, or craft lines may be involved.

On the key question of the procedure by which these matters can be resolved and technological changes facilitated, the Organizations are unwilling to give management any additional freedom. The Organizations believe that ad hoc negotiation, with no agreed-upon ground rules set in advance, and no limit on the ultimate use of economic or strike action, will best protect the interests of their members, and that this process can meet the needs of the industry.

The approach of management, on the other hand, in all its demands before us, has been to seek unrestricted right to introduce changes without that right being subject to negotiation. Moreover, management sees technological change and any resulting loss of employment generally as one of the hazards of industrial life. Only under particular circumstances, and not as a general rule, would management favor protective conditions beyond unemployment compensation for employees affected by technological change.

Such, then, is the present dilemma of the railroad industry with respect to the broad questions of technological change and job security.

The Organizations want greater security for the employees but are not willing to commit themselves in advance to grant management any additional rights to introduce improvements. Management wants the unrestricted right to make changes in technology but is not willing to give in return any comprehensive job security.

This impasse does not serve the interests either of the railroads or of the employees. Of even greater concern, it does not serve the public interest. To obstruct technological advance is to give the public a poorer transportation system, to hobble the railroads in their competition with other modes of transport, and to reduce employment opportunities for all railroad employees. To embrace technological advance without adequate provision for those displaced may seriously disrupt many lives.

The dilemma is not resolved by prophesying that in the future, as in the past, an efficient, competitive railroad system will in the long run provide more employment opportunities than an obsolete one. This is an inadequate answer because it does not solve the problem of the adversely affected employee who finds himself in middle age or later, without a job, possessed of a skill for which there long was, but no longer is, a demand.

The public interest requires that this issue be resolved. We have by no means seen the end of technological and economic changes as they affect the industry. Many proven technological devices are installed on only a fraction of railroad mileage and their widespread adoption must be anticipated. Other improvements lie ahead; new forms of power are on the roads or being tested; new modes of containerization and materials handling are coming to the fore; the prospect that coal can be economically shipped by pipeline has evoked a search for a technological answer in railroad terms. It is even conceivable—and on some runs perhaps likely—that progress in automatic controls will bring the day of the unmanned train.

The goal of our public policy is to take advantage of technological advances and not to permit obstruction of their application. How do we ensure this goal? And, whatever means we choose to secure the goal, what measure of employee protection shall we take to prevent that which is a public good from becoming a private disaster?

It is in line with the historic attitude of the railroad organizations and railroad management and compatible with the spirit of the American people, as reflected in its history, that the goal we have stated be explicitly acknowledged. America, in general, and the railroad organizations, in particular, have always been hospitable to improvements which transfer from human shoulders to machines the tasks that need to be done.

We cannot stress strongly enough the national interest that requires the resolution of this matter in line with the stated goal. Not all nations have been willing to accept and adjust to change. The backwashes of civilization are strewn with the debris of peoples who stood stolidly against change. Where these civilizations have survived, they are characterized by poverty, drudgery, and decay and one of the world's major problems is how to pull these peoples out of their misery. In brief, resistance to change did not mean more employment but less; did not increase competition for man but instead put man into degraded state of competition with burros and donkeys. This is still the case whether the change at issue is an elementary one or involves the latest process of electronic automation or a new form of energy.

We believe that the inventor of the wheel was a human benefactor although he must have temporarily displaced many primitive porters. We believe that he who first tamed a horse and hitched it to a wheel enhanced human weal, despite the great increase in the productivity of the cart over the wheelbarrow—and the consequent displacement of labor.

This faith has in retrospect been justified by experience. The nations which have embraced a change in technology with avidity have in the long run improved the lot of their citizens. Those nations which have scorned a change, or feared it, have prospered neither materially nor spiritually. All have lost the power to defend their freedom—and some have lost the desire to be free.

Indeed, observation reveals that the very ones who loudly decry automation as the curse of our times, the most fervent advocates of the industrial status quo, would leap to the parapets and resist any attempt to restore the technology of a generation ago, although their forbears also declaimed in favor of *their* status quo.

No fair recorder of human history can fail to relate that advancing technology has lifted the most onerous burdens from man's back, has expanded his leisure and enriched his modes of enjoying it, has multiplied his means of obtaining knowledge of himself and his universe, and has provided him with protection against the wrath of nature. That advancing technology can also be put to evil purposes is a problem unrelated to our assignment.

In short, technological advance is a public blessing. Our task is to make sure it is not a private curse.

Any choice but the acceptance of technological change is foreclosed to us for another reason. While freedom of choice may be possible to people living in isolation, no such freedom is available to our Nation, which, with the Western world, is locked in a struggle with international communism. In that struggle we must surpass our

adversaries in mechanization, and, in every way, conserve manpower for defense, for education, for life's amenities, and for the lifting of the standard of living, so that we, in partnership with the Western democracies, may continue to be the object of emulation the world over.

What are the possible steps towards our goals?

1. *A Freeze or Moratorium on Progress.* This, as has already been set forth, is no solution. It is so utterly incompatible with American character and history that it is undeserving of serious consideration. Any industry that commits itself to such a policy is already moribund. Its demise is foreordained. Such an industry cannot be looked to for the furnishing of employment in the future. Moreover, a freeze on technological progress is not the approach of the American railroad industry or of railroad labor.

2. *Unilateral Freedom of Action by Management.* This will not work. It will inevitably provoke labor unrest and recourse to strikes. Insecurity and anxiety are not firm foundation stones for industrial peace. The history of labor relations in the railroad industry is a history of collective bargaining. That history can neither be rewritten nor reversed. It is fatuous to expect that labor organizations as ably led as the railroad brotherhoods will surrender the right to bargain over matters which affect the very lives of their members.

3. *Change Plus Attrition.* This polite word, attrition, which means keeping all present employees, regardless of their usefulness, until the end of their working lives, conceals a number of vices.

a. It means that many employees would devote their time and energy to tasks that need not be done. Such fruitless endeavor does not enhance the human personality. Its true objective is not to furnish employment but to furnish income to the employee whose skill has become superfluous and who has no opportunity for promotion or transfer to a useful task. It ought to be possible to achieve this legitimate end without degrading the employee.

b. Attrition also means that the Nation as a whole is deprived of useful service which potentially retrainable and productive employees coming under such a plan could otherwise render.

c. Finally, attrition is a slow process. The rate of technological change is now so rapid that attrition alone may not have digested one change before we are caught up in another.

Rational examination of attrition as a sole remedy leads to the conclusion that it is inadequate.

4. *Change Plus Reduction in Hours.* Reduction in working hours is appropriate under two circumstances: where hours are unreasonably long and where hours are being reduced in the Nation for employees

generally. Where there are unreasonably long hours among operating employees, it is recommended in a later chapter of this report that they be reduced. A further general reduction of hours for operating employees, however, is not now consistent with our national interests, which require high and growing levels of output and therefore the full use of our manpower and resources. A sudden general reduction of hours throughout the Nation would most likely lower our total output and would not necessarily create more jobs.

This, then is not the solution any more than it would be to cure undernourishment by cutting a patient's diet every time he loses weight. Standards of living cannot be lifted by diminishing the supply of goods and services, certainly not when the country is clamoring for more and better housing, more and better schools and longer schooling and more and better recreational facilities, more medical and nursing care, more provision for the aged. Indeed the simplest appraisal of the objective facts suggests that we shall need to work hard and steadily to achieve, in many areas, the basic minima of decent living.

General shortening of hours is a process of slow social change, achieved over decades as the Nation can afford such shortening of hours; it is not usually a suitable tool for handling problems of adjustment to change in a particular industry. Hours reduction in a single industry would merely create inequity. A happy society cannot be constructed in which some work many hours and others but a few.

5. Progress Plus Protection. A more reasonable approach seems to require a direct accommodation between the two competing interests, change and security, since both are valuable social goals. In the proceedings conducted by this Commission, the Organizations have suggested the provision of protection to the adversely affected employees in the event of their displacement. Implicit in the Carriers' approach to change is a degree of willingness to consider protective arrangements provided they are left free to introduce the changes they find necessary to the full realization of technological progress.

Thus there is substantial agreement that, in the short range, the problem of technological displacement has been visible, acute, and grave for the individual worker affected by change, particularly the older worker who has relatively greater difficulty in finding a job or in being retrained. The avulsive disappearance of his craft presents a disaster of the first magnitude. It is clear beyond question that he ought not to be left to cope with that disaster alone and unaided.

An adequate program to realize the benefits of advancing technology in the public interest, therefore, must include both reasonable opportunity for management to achieve change, and for workers to enjoy

reasonable protection against the harsh effects of too sudden change. Progress plus protection must be our choice.

Our recommendations will, we believe, give management reasonable opportunity to introduce change. Some recommendations to this effect are set forth in other chapters of this report, dealing with specific issues. It is also necessary, however, to specify the degree of freedom which should attach to the making of other changes. Where management now has the right to make changes, this right should remain. Where the introduction of a technological change is now subject to collective bargaining, we believe that collective bargaining should continue. Where, however, there is no terminal process for ensuring a speedy resolution of disputes over rule or agreement issues incident to technological change (such as seniority arrangements, the setting of job rates if job content is changed, allocation of work among crafts, or other working conditions), such a mechanism should be provided.

In our view employee protection should extend to those affected by technological change both where management now has the right to make the change and where introduction of the change is now subject to collective bargaining.

Consideration of the form of protective conditions in this industry inevitably starts with review of the provisions of the Washington Agreement of 1936. These provisions, or similar provisions in the Transportation Act of 1940, have been successfully applied to railroad mergers, so that the cost of protection has in fact become a part of the calculation in the development of merger plans. Over time, these provisions have on occasion been extended to non-merger situations—e.g., abandonments and other changes involving only the internal operations of a single railroad company.

As in the case of mergers, so in the case of technological improvement, the cost of a reasonable plan for the protection of employees affected should be a charge against the savings obtainable from such improvement.

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties negotiate a rule which should provide as follows:

1. Railroad management has and may exercise the right to introduce technological changes without limitation, subject only to the procedures hereinafter specified in paragraph 2 and subject to the provisions for employee protection hereinafter defined in paragraph 3.

2. Whenever the introduction of a technological change cannot be accomplished or where its benefits could not be fully realized without amendment of one or more of the rules or agreements in effect, the carrier proposing to make the change shall give reasonable notice to the affected organization or organizations. All parties affected by the proposed changes shall, upon expiration of the notice period, engage in joint negotiations concerning amendments of such rules or agreements. If agreement has not been reached within 60 days, any party may submit the question for final and binding determination by the special tribunal established pursuant to recommendation 2 of part I of chapter 6. Pending the decision of this tribunal such technological change shall not be introduced.

This tribunal shall consider and decide only issues raised concerning amendments to the rules or agreements affected. It shall not undertake to examine whether the technological change is to be introduced; nor what protection shall be afforded to displaced employees.

3. Every employee deprived of employment as the immediate and proximate consequence of technological change shall be entitled:

(a) to the schedule of allowances set forth in recommendation 7 of chapter 4 for the full range of years set forth in Section 7(a) of the Washington Agreement of 1936;

(b) to the option of choosing the lump sum separation allowances set forth in recommendation 8 of chapter 4 in lieu of the benefits set forth in (a) of this paragraph for the full range of years set forth in Section 9 of the Washington Agreement of 1936;

(c) to the retraining subventions specified in recommendation 10 of chapter 4, and

(d) to the preferential hiring status set forth in recommendation 3 of chapter 3.

Wage-Structure Components and Earnings

Part IV

COMPENSATION

2. When the patient is in a position of extreme distress, the physician should be prepared to administer morphine or other sedative drugs. The dose of morphine should be 1/4 grain (15 mg.) subcutaneously or 1/2 grain (30 mg.) orally. The dose of other sedative drugs should be 1/2 grain (30 mg.) orally. The physician should be prepared to administer oxygen to the patient. The dose of oxygen should be 2-3 liters per minute. The physician should be prepared to administer artificial respiration to the patient. The physician should be prepared to administer other measures as may be required.

The physician should be prepared to administer other measures as may be required.

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The physician should be prepared to administer other measures as may be required.

COMPLETION

The physician should be prepared to administer other measures as may be required.

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CHAPTER 8

Wage Structure: Components and Earnings

The pay rules and wage relationships within an industry are significantly shaped by the technology of that industry. Many railroad operating employees—as the name implies—have a mobile work place rather than a fixed work community as in factory employment. Managerial and supervisory arrangements are different where employees are away from direct and immediate contact with their superiors for long periods. The hours of many operations are around the clock. The train crew has direction of expensive equipment and cargo, and the consequences of accidents are severe. The direct contract between employees and the traveling and shipping customer may influence the volume of business of a carrier. The volume of freight car loadings is very sensitive to general business conditions resulting in fluctuations in employment. These and other features of the railroad environment have shaped over the years a distinctive industrial relations system in the railroad industry and a distinctive set of compensation rules.

The methods of compensation of railroad operating employees, and the associated pay rules, are probably the most complicated of any major industry in the United States:

First, there are a great many separate components to the wage rate structure, such as daily rates, mileage rates, overtime rates, graduated rates with different locomotive power and length of trains, guarantees, special allowances called arbitraries for the performance of particular tasks or for particular inconvenience or delays, mileage limitations, and the like, many of which in turn vary with the class of service and craft.

Second, the effect of any one pay rule upon earnings depends upon other components of compensation: they are highly interdependent as illustrated in the operation of the dual basis of pay to be explained below.

Third, the railroad wage structure and its various components is not an accurate indicator either of the earnings to the men or the

labor costs to the carriers. As William Z. Ripley said in an historic study of the industry's wage structure over 40 years ago:

No rate per hour, day, month, trip or mile is a reliable index of the amount of compensation in the aggregate which the men receive; and all comparisons purporting to show relative earnings which deal in terms of rates per unit of performance are worse than misleading.

Proposals to change daily, mileage, overtime, or mileage limitations pay rules are to be appraised in terms of their impact on earnings and labor costs, but estimates of the effects of changes in the wage structure or its components on earnings per trip, week, month, or year are most difficult to project.

Fourth, the wide variety of operating conditions and work performed—from railroad to railroad, from division to division, within each division and on each run depending on the class of service, grades, road beds, power, loads, weather, traffic, safety, and the like—constitutes a basic problem for any system of compensation for operating employees. The range of variation in job conditions is no doubt far greater than in most other industries. To establish equitable wage relationships, as every wage system seeks to do, among different groups of operating employees—by craft, type of service, responsibility, work performed, or other categories—is a peculiarly complex problem under the diversity of operating conditions that prevail. This difficulty is the more serious because the pay rules are generally national in scope and are determined in national negotiations for all carriers. The seniority arrangements on the railroads have been a necessary and inherent concomitant to the methods of pay, giving senior employees the choice of runs under the wide variety of operating conditions.

The statistical data adequately to describe and to appraise the compensation structure of the operating employees of the railroads, moreover, have not previously been available. Average data by occupation and class of service are reported, it is true, by regular ICC series. These wage data are inadequate, however, for present purposes, and that whole system of concepts, measures, and reporting procedures should be reviewed and changed to meet a broader set of requirements. The extensive tabulations of Trip Characteristics and Earnings Data developed by this Commission in its Pay Structure Study provide the first opportunity for a thoroughgoing analysis of the wage structure and earnings relationships for operating employees. These new data will no doubt be of immense value to the parties in collective bargaining in the period immediately ahead as they continue to review and revise the pay structure.

The Dual Basis of Pay

The methods of compensation of road operating employees evolved gradually with the growth of the railroads in the second half of the 19th century. The earliest method of wage payments was on a daily or monthly basis. The problems created by irregular runs, extra service, and the wide variety of work required on different runs under different conditions for the same pay led to the substitution of trip rates on some railroads. But a trip still constituted a variable packet of tasks to be performed for the same pay and trip rates tended to encourage individual bargaining over the rates to apply to particular trips. From this experience the process of collective bargaining developed the "dual basis of pay" which involved (as will be explained below) both an hours and a mileage component in compensation. While the dual basis of pay had been adopted for train and engine service personnel on many railroads by the early years of this century, it was the orders of the Director General of Railroads during the period of Government operation during and after World War I that standardized and made national many of the existing compensation rules.

The dual basis of pay may be explained by illustrative reference to the standard basic day and overtime rule in freight engine service. The rule states:

(a) In all classes of road service, except passenger service, 100 miles or less, 8 hours or less (straightaway or turnaround) shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, according to class of engine or other power used.

(b) On runs of 100 miles or less, overtime will begin at the expiration of 8 hours; on runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by $12\frac{1}{2}$. Overtime shall be paid for on the minute basis, at an hourly rate of $\frac{1}{16}$ of the daily rate, according to class of engine or other power used.

An illustration may be helpful in explaining the main features of the dual basis of pay. The current wage schedule for Engineers in Through Freight Service (in the Eastern Territory) provides for a Daily Rate of \$24.97 and a mileage rate of 24.97 cents per mile (the Daily Rate divided by 100 miles) on locomotives with "weight on drivers" of 900,000 and less than 950,000 pounds (3 or 4 diesel units in the locomotive). Under this schedule, if the engineer runs up to 100 miles in 8 hours or less his basic pay will be \$24.97. The Daily Rate is a form of daily minimum and thus applies for runs of 100 miles or less, completed in 8 hours or less. If the run was 150 miles and completed in less than 8 hours the pay would be \$37.455 (150 miles times the mileage rate of 24.97 cents per mile).

The compensation of the through freight engineer used in this example for trips over 8 hours is more complex. For runs of 100 miles or less completed in over 8 hours, the familiar rule of outside industry of time and a half the hourly rate (or $\frac{3}{16}$ the daily rate) applies. In this illustration the 9th, 10th or additional hours for trips of 100 miles or less, would be compensated at \$4.68 per hour [$(\$24.97 \div 8) \times 1\frac{1}{2}$].

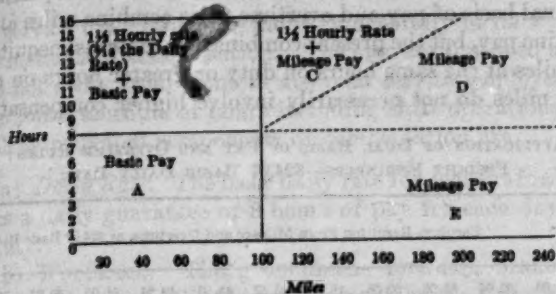
For runs over 100 miles completed in over 8 hours, it is first necessary to ascertain the "threshold of overtime," that is, the combination of miles and hours after which overtime rates apply. This overtime concept is quite different from that which applies in industry generally where overtime rates normally apply after 8 hours of work a day or after specified hours of work per week rather than depending in part upon how much work is performed.

The rule quoted above, applicable in through freight service, states that overtime will begin "when the time on duty exceeds the miles run divided by $12\frac{1}{2}$." Thus on a 125-mile run overtime applies after 10 hours ($125 \div 12.5 = 10$). If an employee is on duty in excess of 10 hours on a 125-mile trip, he is paid overtime for those excess hours. On a 150-mile freight run, the threshold of overtime is reached at 12 hours, and on a 175-mile run it is reached at 14 hours of on-duty time. As long as the threshold of overtime is not reached, that is, as long as miles run per hour on duty exceeds $12\frac{1}{2}$, then the mileage component of compensation alone applies. Thus, a run of 125 miles completed in 10 hours would involve pay of \$31.2125 ($125 \times .2497$), the same pay as required if the run were completed in 8 hours or any number of hours less than 10. For hours worked beyond the threshold of overtime, time and a half the hourly rate ($\frac{3}{16}$ the daily rate) is paid in addition to the mileage pay. If the run of 125 miles were completed in 12 hours, overtime pay of \$4.68 per hour for each of the 2 hours over 10 would be added to the \$31.2125, making basic pay for the trip \$40.57.

The dual basis of pay thus takes its name from the fact that both hours and miles affect compensation, and it is always necessary to know both hours on duty and miles run to compute compensation. For some combinations of miles and hours the daily rate component of compensation is determinative and for other combinations the mileage basis of pay is determinative.

The diagram below summarizes the way in which the dual basis of pay operates for all varying combinations of hours on duty and miles run:

Dual Basis of Pay. Freight Service



The lower left hand sector of the diagram (A) shows combinations of 8 hours or less, 100 miles or less for which the daily basic pay applies. In sector (B), for hours over 8, up to 16 hours at which there is an outright prohibition of further time on duty, and for 100 miles or less, time and a half the hourly rate ($\frac{3}{16}$ the daily rate) is added to the daily basic pay for each hour of overtime. The mileage rate applies for all miles over 100 where the miles run per hour on duty exceed $12\frac{1}{2}$, or in sectors D and E. An overtime hourly rate is added to the mileage factor when the miles run per hour fall below $12\frac{1}{2}$ (sector C). That is, where hours increase faster than miles over 8 hours and 100 miles, an overtime factor is added to the mileage component. The diagram shows that a run over 8 hours may be paid under 3 different systems of computation (hourly overtime, mileage plus hourly overtime, and mileage alone) depending on the miles actually run, and that a trip of over 100 miles may be paid under two systems of computation (mileage plus hourly overtime or mileage alone) depending on the hours actually taken for the trip.

The independent effect of the dual basis of pay and overtime rules on earnings per trip is illustrated in the table below for through freight engineers. The basic daily rate is \$24.97, as has already been noted, for the average power used, 900,000 to 950,000 pounds weight on drivers. The table shows earnings per trip from the dual basis of pay component of compensation for trips at 20-mile intervals between 60 and 280 miles completed in varying hours between 3 and 14 hours on duty.

While the next chapter includes an analysis of the effects of the dual basis of pay and overtime rules on trip earnings, it may be observed here that there are inherently many anomalies and inequities among trips. Thus, table 1 reveals that a through freight engineer receives the same pay regardless of whether he runs 180 miles in 3 hours or 14 hours, and he receives more pay for running 100 miles in 12 hours

than he does for running 120, 140, or even 160 miles in 12 hours. The present dual basis of pay and overtime rules combine miles and hours to determine pay, but the present combination contains inequities since greater miles at the same hours on duty or greater hours on duty for the same miles do not necessarily involve higher compensation.

TABLE 1. APPLICATION OF DUAL BASIS OF PAY AND OVERTIME RULES: THROUGH FREIGHT ENGINEERS—\$24.97 BASIC DAILY RATE

Hours on duty per trip	Earnings Resulting From Mileage and Overtime, at \$24.97 Basic Rate														
14	53.06	53.06	53.06	50.56	48.07	45.57	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
13	48.38	48.38	48.38	45.88	43.39	40.89	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
12	43.70	43.70	43.70	41.20	38.71	36.21	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
11	39.02	39.02	39.02	36.51	34.01	31.51	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
10	34.33	34.33	34.33	31.83	29.33	26.83	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
9	29.65	29.65	29.65	27.15	24.65	22.15	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
8	24.97	24.97	24.97	22.47	19.97	17.47	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
7	24.97	26.97	24.97	29.96	24.96	30.95	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
6	24.97	24.97	24.97	29.96	34.95	39.95	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
5	24.97	24.97	24.97	29.96	34.96	39.95	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
4	24.97	24.97	24.97	28.96	34.96	39.95	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
3	24.97	24.97	24.97	29.96	34.96	39.95	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
2	24.97	24.97	24.97	29.96	34.96	39.95	44.95	49.94	54.93	59.93	64.92	69.92	74.92	79.92	84.92
	60	80	100	120	140	160	180	200	220	240	260	280	300	320	340
	Miles Run Per Trip														

Components of Compensation

In order to understand wage and earnings relationships among the operating employees of the railroads it is first essential to outline briefly the present principal components of the wage structure—those separate rules which constitute the compensation structure. In a certain sense almost every rule affects in some way the compensation and relative earnings of employees. The present concern, however, is only with the major explicit components, including those which the Carriers or the Organizations have served notice to change. The present description can be only a first approximation since there are many qualifications, refinements, and variations on these rules among various railroads.

In order to simplify the presentation, the major current components of compensation are separately reviewed for yard service, freight service, and passenger service. There are not only major differences in the pay rules by type of service, but there are also significant variations in miles run, hours on duty, and regularity of employment among these classes of railroad service. Furthermore, employees move among classes of service according to their seniority; in the same workweek an employee may work in several classes of service. Approximately one half the operating jobs are in yard service, 25 percent in through freight service, 15 percent in local freight service, and 10 percent in passenger service.

Yard Service

Yard service most resembles industry generally in its work schedules and methods of compensation. The men are stationed at a yard; they are not away from home as are road service employees. They work a regular schedule of hours including shift operations at many yards. The principal components of compensation are:

(a) *Daily Rate.* The basic daily rate for each craft also constitutes a daily guarantee of 8 hours of pay for each day assigned to duty.

(b) *Workweek.* The groundmen—foreman, brakemen, and switchtenders—and the firemen generally have a 5-day week. The engineers have a 6- or 7-day week, depending on the assignment. As a consequence of previous collective bargaining the engineers may elect a 5-day week, on a national basis alone, and if they do their daily rate will be increased \$1.66 for locomotives weighing 250,000 to 300,000 pounds on drivers. There are no national rules for weekly guarantees for any craft.

(c) *Overtime.* All time worked over 8 hours a day is paid at $1\frac{1}{2}$ times the hourly rate, or $\frac{3}{16}$ the basic daily rate.

(d) *Graduated Rates.* Engine service crafts—engineers and firemen—have rates of pay which are graduated according to the weight on drivers of the locomotives so that the daily rate is higher the heavier the power used.

(e) *Arbitraries.* Under most circumstances when an air hose is coupled by any member of the ground crew, every member receives 95 cents additional a day regardless of the number of times the task is performed. This arbitrary payment is as high as one hour's pay on some railroads, and on other railroads an allowance for air hose coupling has been incorporated in the daily rate resulting in an above-standard rate. There are other less common arbitraries which vary from railroad to railroad.

(f) *Mileage Limitations—Daily Equivalents.* The number of men assigned to yard service will be such that on a monthly basis crews may normally expect to receive not less than 20 and no more than 30 days' pay where the 5-day week is in effect and not less than 26 and no more than 35 days' pay where the 6-day week is in effect. These pay rules are the counterpart of mileage limitation rules for road service employees.

(g) *Holidays in Lieu of Rate.* Some yardmen have chosen to accept four cents an hour less pay in exchange for paid holidays, up to seven a year, provided the holiday falls on a workday of the employee's regular assignment.

Road Service: Freight Service

There are some elements of compensation which differ as between local freight and through freight. Moreover, there are rules which vary among railroads, such as those defining "converted through freight." Under these rules through freight crews are paid the higher local freight daily and mileage rates on runs during which three or more stops, to cite a typical rule, are made to set out or pick up cars.

The principal components of freight service compensation are as follows:

(a) *Dual Basis of Pay.* A hundred miles or less, 8 hours or less, constitutes a day's work, for which the daily basic rate is paid. The daily rate for engineers, for example, is 56 cents higher in local freight service than in through freight service, and the mileage rate accordingly 56 one-hundredths cents per mile higher, at each weight on drivers.

(b) *Overtime.* Under the dual basis of pay in freight service, overtime is paid when an employee is on duty in excess of 8 hours and does not average $12\frac{1}{2}$ miles per hour. (See diagram.) The applicable overtime rate is $\frac{3}{16}$ the daily rate for overtime hours.

(c) *Graduated Rates.* The compensation of engine service employees varies with the power used to pull trains, and the compensation of train service employees in local and through freight service varies with the maximum number of cars in the train during a road movement. In general, in local and through freight 18 cents is added to the daily rate of engineers (16 cents for firemen) for each 50,000 pounds increase in weight on drivers. A schedule provides for additions to the daily rates of conductors and brakemen, of an additional 20 cents for the first 81 cars and varying sums for each additional block of cars in the maximum number of cars hauled in the train in a road movement.

(d) *Guarantees.* Whenever an employee is called to work, the basic daily rate constitutes a form of guarantee in all classes of service. Further, in local freight service, employees not subject to other guarantees have daily earnings minima which exceed the basic day minimum rate by specified amounts: 70 cents in the case of conductors and trainmen, 95 cents for engineers, and \$1.52 for firemen. In addition, train-service employees and, on some railroads, also engine-service employees, have a monthly guarantee specifying that regularly assigned local freight employees shall have compensation at least equal to the minimum daily wage for each calendar working day (other than Sundays) in the month. These guarantees in local freight service, except on a few railroads, do not apply to through freight service.

(e) *Arbitrariness and Special Allowances.* Arbitrariness and special allowances are payments to employees for the performance of certain types of work, or for inconveniences and delays. These payments are in the form of fixed amounts, mileage, or time. They are normally independent of and in addition to the regular daily or trip compensation. Thus, initial terminal delay is paid when crews are held at initial terminal more than 1 hour and 15 minutes after being required to report and final terminal delay is paid if they are not released within 30 minutes following arrival. If the total run extends into overtime, including these delays, then either overtime or the terminal delay time is paid, whichever is greater. Other examples are payments for side trips, lap backs, doubling hills, exchanging engines, using telephone or radio, refueling engines, turning engines, switching at intermediate yards. Some of these payments are governed by national rules, as in the case of initial and final terminal delay, while many of the other arbitrariness are established by collective bargaining on the individual railroads.

(f) *Higher Than Standard Rates.* In the gradual evolution of pay rules in the railroad industry, a number of runs have acquired and retained differential rates above standard. The higher rates typically apply to particular divisions or territory: they may be expressed as higher mileage or hourly rates or as extra allowances measured in time or miles. The mountain and desert differentials, largely in the West, are illustrative. Other higher-than-standard rates are paid on some railroads to employees in mine runs, road switching and roustabout, and other miscellaneous classes of road service.

(g) *Mileage Limitation Rules.* The pay rules specify that men in freight service on a monthly basis may normally expect to receive not less than a specified minimum number of miles. Under a mileage basis of pay the mileage limitation rules are designed to control the distribution of earnings opportunities among various groups of employees. These rules are in part a device to share the work and earnings. When the men in pool service and in extra service are exceeding or are expected to exceed the maximum monthly mileage limits, the local chairman and the superintendent add additional men to the pool or extra board and the employees exercise their seniority to bid in such service. Alternatively, when men in pool or extra service are below or are expected to average below the minimum mileage limits, men are removed from the pool or extra board in reverse order of seniority.

The present monthly mileage limitation rules generally provide as follows:

	Minimum (miles)	Maximum (miles)
Assigned and pool freight: ¹		
Engine service-----	3,200	3,800
Train service-----	3,500	4,500
Extra freight service: ¹		
Engine service-----	2,600	3,800
Train service-----	3,500	4,500

¹ Generally speaking employees engaged in assigned service have regular runs with scheduled departure times. Employees in pool service work out of an established pool of crews in rotation and are assigned to runs between fixed points; the crew first arriving at the home or away-from-home terminal stands in first position for service out of either terminal. Extra service operates on a rotating or seniority basis and employees in this service handle trains other than those operated in assigned or pool service. Employees in extra service are also used to fill vacancies in pool and assigned service.

Road Service: Passenger Service

The major components of compensation in passenger service differ in some respects as between straightaway passenger service and short turnaround (commuter) passenger service. This description is first confined to straightaway passenger service and a later brief section notes the distinctive features of short turnaround passenger service. The dollars and the miles in the pay rules applicable to passenger service have differed since the earliest days of railroads from those in freight service because the speeds and the miles run per passenger service trip have exceeded significantly those in freight service. The components of compensation in passenger service may be summarized in brief since the pay arrangements resemble those in freight service.

(a) *Dual Basis of Pay.* In engine service—for engineers and firemen—100 miles or less, 5 hours or less, constitute a day's work, for which the daily rate is paid. In train service—for conductors and brakemen—150 miles or less, 7½ hours or less, constitute a day's work, for which the daily rate is paid.

(b) *Overtime.* Under the dual basis of pay in passenger service overtime is paid when an employee does not average 20 miles per hour (100 miles divided by 5 hours for engine service and 150 miles divided by 7½ hours for train service employees) except that when the minimum day is paid for the service performed, overtime does not accrue until the expiration of 5 hours in passenger engine service, or 7½ hours in passenger train service, from the time of first reporting for duty. The applicable overtime rate is one-eighth the daily rate. This overtime rate is thus below the straight time hourly rate, which is the daily rate divided by 5 hours in engine service or 7½ hours in train service. How-

ever, passenger trains generally average speeds in excess of 20 miles per hour, and, therefore, overtime is rarely paid.

(c) *Graduated Rates.* The compensation of engine-service employees varies with the power used to pull trains; there is no graduation according to length of trains in passenger service for conductors and brakemen. In general, 8 or 9 cents for engineers and 8 cents for firemen is added to the daily rate for each 50,000 pounds increase in weight on drivers.

(d) *Guarantees.* Engine crews in passenger service have minimum daily guarantees. The earnings for each day of service is at least \$1.52 in excess of the minimum basic daily rate of \$20.26 for engineers and \$1.84 in excess of the minimum daily rate of \$17.74 for firemen.

The guarantees applicable to train crews in passenger service are more complicated since there are both daily and monthly guarantees. The monthly guarantee is equal to 30 times the basic daily rate for regularly assigned passenger trainmen, if available for service the full month. A daily earnings guarantee applies to all passenger train crews, including extra men, and provides for daily earnings from all service at 90 cents in excess of the basic daily rate. Overtime payments may be used to make up the daily guarantee but may not be used to make up the monthly guarantee.

(e) *Arbitraries.* Initial terminal delay time is generally paid after passenger-engine crews have been held for more than 1 hour, as compared to 1 hour and 15 minutes in freight service, after being required to report. Initial terminal delay rules for passenger-train crews vary among railroads. Final terminal delay time, as in freight service, for engine and train service, begins after 30 minutes following arrival at the final terminal. Also as in freight service, if the total run extends into overtime, including these delays, either overtime or the terminal delay payment is paid, whichever is greater. A variety of other arbitraries is applicable to passenger service.

(f) *Higher than Standard Rates.* These additions to mileage or daily rates, or allowances in both rates, that are applicable to freight service also apply in general to passenger service, although there are many variations and adaptations on particular railroads and divisions.

(g) *Mileage Limitations.* The present monthly mileage limitation rules generally provide as follows:

Assigned and extra passenger service:		Minimum (miles)	Maximum (miles)
Engine service	-----	4, 000	4, 800
Train service	-----	5, 500	6, 600

(h) *Classifications.* In passenger service there are a number of additional classifications, with associated rates, which do not arise in freight service. Among these classifications are assistant conductors, ticket collectors, and various special classifications of baggagemen relating to the handling of express and mail in various categories.

Short Turnaround Passenger Service

There is no speed basis of overtime in short turnaround passenger service. Overtime is paid for all time in excess of 8 hours within 9 consecutive hours, and for all time in excess of 9 consecutive hours. Thus, an engineer in short turnaround passenger service who runs 180 miles and is on duty 10 hours, excluding one deductible release interval, is paid for 180 miles and 2 hours of overtime. The applicable overtime rate is one-eighth the daily rate.

Factors Determining Earnings

There are likely to be vast differences, it was noted at the outset of this chapter, in the relationships between wage rates on the one hand and earnings on the other of operating employees on the railroads. Changes in earnings from one period to another, particularly over many years, are not uniquely related to changes in wage rates or other components of compensation. The yield of the wage rate structure in earnings to the employees and labor costs to the carrier is perhaps of even greater significance than the components of compensation. The factors affecting earnings—per trip, calendar day, week, month or year—may be usefully classified in three general groups:

- (1) a change in the hourly or mileage rate or in any of the other components of compensation or the addition of new components to the wage structure;
- (2) an increase or decrease in the actual number of miles run or hours worked and a change in the combination of miles and hours or in the speed of trains;
- (3) A change in the relative distribution of hours or miles among the classes of service and the various pay brackets of the separate components of compensation. Thus, a change in the weight of locomotives or length of trains under graduated rates, a change in the relative frequency of runs with above standard rates, a change in the frequency of occurrences for which arbitraries are paid, and the operation of mileage limitations may all be expected to affect the actual earnings produced by the pay rules.

The impact of these factors on earnings will be reflected differently depending upon the measure of earnings that is used. For instance, an increase in the speed of trains may reduce time on duty and increase the earnings per hour on duty but not directly or materially affect weekly or annual earnings without other changes in railroad operations or pay rules.

Three illustrative tabulations may help to underscore the significance of differentiating between the components of compensation and the factors influencing earnings.

(1) The following tabulation is drawn from the Commission sample study for the second half of 1960. The figures refer to engineers in various classes of service and show weekly hours on duty and weekly earnings by several components of weekly earnings. The data are national averages and, of course, conceal great variations within each class of service.

Class of service	Engineers					
	Basic daily rate, Mar. 1, 1961, average graduation ¹	Total hours per week	Second half 1960 weekly earnings			
			Straight time	Overtime	Arbitraries and constructive allowances	Total ²
Straightaway passenger.....	\$21.21	25.4	\$194.	\$0.00	\$6.43	\$201
Through freight.....	24.97	30.3	166.	1.96	17.80	185
Converted through freight.....	24.99	47.0	159.	20.03	12.88	193
Local freight (excluding converted freight).....	23.46	50.8	133.	44.45	8.24	186
Yard.....	23.35	46.8	128.	13.66	2.33	145

¹ The average weight on drivers for engineers, derived from the Commission's Pay Structure Study.

² Largely because of rounding the previous three columns do not add precisely to these totals.

Basic daily rates, for average weight on drivers used, show relatively small differences among classes of service. It is even true that except for yard service, there are relatively small differences in average weekly earnings. But there are vast differences in the average hours worked per week and in the amounts of weekly overtime and arbitraries and constructive allowance payments which tend to offset differences in straight time earnings. Thus, through freight and local freight engineers both had weekly earnings of \$185, but through-freight engineers worked 30.3 hours a week while local freight engineers worked 50.8 hours a week. These variations can be understood more readily, perhaps, by reference to the diagram explaining the dual basis of pay. The local freight runs show an average combination per trip of 98 miles and 10.2 hours. At these combinations overtime at $1\frac{1}{2}$ the hourly rate is the significant factor in earnings, and mileage rates

are not determinative. The through freight rates reflect an average combination per trip of 120 miles and 5.6 hours.¹⁷ At these combinations the mileage rate is determinative.

(2) The significance of the factors influencing earnings can best be seen by observing changes over a period of years. The following tabulation has been prepared from ICC data, and shows average basic daily rates and various measures of earnings for through freight engineers for 4 years—1922, 1940, 1950, and 1960. The tabulation also includes measures of hours, miles, and trips.

Through Freight Engineers				
	1922	1940	1950	1960
Average basic daily rate.....	\$7.27	\$8.78	\$14.53	\$24.10
Total earnings per trip.....	10.91	11.68	21.60	34.36
Average straight time hourly earnings.....	1.00	1.53	2.62	4.51
Average earnings per hour on duty.....	1.10	1.60	3.02	4.23
Average weekly earnings (derived).....	53.08	61.60	107.21	174.41
Average annual earnings per employee.....	2,804.00	3,227.00	5,500.00	9,068.00
Average hours per trip.....	9.9	7.3	7.2	7.0
Average hours per week.....	48.8	38.5	33.5	30.0
Average miles run per hour on duty.....	9.5	14.8	15.0	18.1
Average miles run per trip.....	94.0	108.5	108.4	126.6
Average number of trips per week.....	4.9	5.3	4.9	4.7

¹⁷ 1950 data.

¹⁸ ICC data show 6.0 hours for 1959; the Commission's Pay Structure Study shows 5.6 hours for the second half of 1960.

These figures show that basic daily rates increased 3.3 times between 1922 and 1960. Total earnings by trip, average weekly earnings and average annual earnings increased in about the same proportions. But average earnings per hour on duty increased almost six-fold, reflecting the increased speeds, shorter hours and greater miles run per trip. Hours on duty per week necessary to produce the higher weekly earnings declined 48 percent.

The contrast between through freight and local freight is instructive and may be seen by comparing the above table with that which follows. (The comparison is complicated in that ICC data for converted freight are not adequately separated from local freight.)

¹⁹ ICC data show 6.0 hours for 1959; the Commission's Pay Structure Study shows 5.6 hours for the second half of 1960.

Local Freight Engineers

	1922	1940	1950	1960
Average basic daily rate.....	\$7.40	\$8.97	\$14.40	\$23.87
Total earnings per trip.....	11.73	12.00	22.14	*35.28
Average straight time hourly earnings.....	.95	1.34	2.01	3.43
Average earnings per hour on duty.....	1.09	1.34	2.30	4.03
Average weekly earnings (derived).....	\$6.63	78.75	141.42	216.50
Average annual earnings per employee.....	\$3,475	\$4,095	\$7,354	\$11,258
Average hours per trip.....	10.8	8.4	9.7	*9.3
Average hours per week.....	61.8	58.6	61.4	*52.8
Average miles run per hour on duty.....	6.9	9.4	8.9	*10.1
Average miles run per trip.....	74.2	87.6	94.5	*95.6
Average number of trips per week.....	5.7	6.3	6.3	*5.8

* 1960 data.

These figures reflect the facts that basic daily rates, total earnings per trip, weekly and annual earnings in local freight, as in through freight, have increased over 3 times in the period 1922-60. But speeds have increased much less in local freight and average earnings per hour on duty have increased less than fourfold, as compared to almost sixfold in through freight. Weekly hours have declined only 12 percent over the 38-year period. The mileage component of the dual basis of pay has had little influence in local freight.

(3) The Carriers presented an analysis showing the separate influences that have increased earnings per hour on duty in the period from 1936 to November 1959-April 1960. For through freight engineers the role attributed to separate factors was as follows:

Increase in hourly rates.....	\$1.651
Overtime rules.....	.011
Constructive allowances.....	.440
Speed basis of pay.....	1.858
Graduated rates.....	.492

Total increases..... \$4.452

While earnings per hour on duty is only one measure of earnings, these data also support the necessity of exploring the earnings yield of the various pay rules and components of compensation of operating employees. A comprehensive view of the current structure of earnings—per hour, per trip, and per week—is essential to the appraisal of proposals to revise the pay rules on the railroads.

Hours, Miles, and Earnings Per Trip

Prior to the wage studies of the Commission, only average data were available as to hours on duty, miles run, and earnings in road service. It is useful to know, as ICC data indicate, for instance, that through freight engineers in 1959 averaged 116.8 miles per trip, worked 6.0 hours on duty per trip, and earned an average of \$36.30 per trip. It is also essential for a full analysis to know for each run its earnings, the miles run and hours worked to secure these earnings. Averages give no indication of the wide diversity in the combinations of hours, miles, and earnings that exist in a single class of service. The sample survey of Trip Characteristics and Earnings Data in the Commission's Pay Structure Study, and the related studies of individual railroads made by the Carriers, provide the first opportunity to describe adequately the structure of earnings in any class of road service. From the Commission's Pay Structure Study, we are able to learn, in addition to what we know from ICC data, that 15 percent of through freight engineer trips averaged over 140 miles, that 12 percent of the trips took more than 8 hours on duty, and that 16.3 percent earned more than \$40 a trip.

These data are also indispensable to estimate the effects of any proposed change in the pay rules on total compensation or on labor costs. It is impossible to estimate adequately the impact of a change in the mileage rate, the daily rate and overtime rules, for instance, without knowledge of the distribution of runs. While changes in pay rules may lead the carriers in the future to change the distribution of runs and their characteristics by miles and hours, calculations of the costs of changes in pay rules ought to start with the present distribution of runs.

The following six tables summarize the earnings per trip for engineers and conductors in through freight, local freight and straight-away passenger service. These tables are so constructed that for each combination of miles and hours there is shown both the frequency of such runs and the average total earnings for each trip from all components of compensation.

WAGE STRUCTURE COMPONENTS

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TABLE 2. AVERAGE TRIP EARNINGS BY NUMBER OF MILES RUN AND HOURS WORKED FOR ENGINEERS IN PASSENGER STRAIGHTWAY SERVICE, JULY 1-DEC. 31, 1960

[Each box shows average earnings and number of trips for (in parentheses) indicated miles run and hours worked]

Number of hours worked	Number of miles run												Total number of trips
	75 and under	76-100	101-125	126-150	151-175	176-200	201-225	226-250	251-275	276-300	301-325	326-350		351 and over
13.1 and over													
12.1-12													
11.1-12				\$48.25 (1)								\$59.92 (1)	
10.1-11							\$44.18 (2)			\$62.77 (2)			
9.1-10													
8.1-9													
7.1-8				35.17 (1)	\$34.38 (6)	\$43.07 (18)			\$55.35 (10)	\$8.17 (2)	\$69.60 (1)	77.78 (2)	
6.1-7			\$25.59 (1)	31.41 (1)	36.07 (2)	41.94 (11)	48.53 (4)	\$58.40 (3)	52.45 (10)	\$6.36 (1)		77.33 (1)	
5.1-6		\$24.67 (4)	27.95 (7)	30.61 (24)	35.98 (47)	40.56 (11)	46.19 (12)	54.09 (7)		63.99 (2)	64.14 (2)		
4.1-5	\$21.73 (1)	31.73 (12)	33.96 (46)	39.65 (68)	35.77 (107)	40.76 (26)	48.00 (39)	52.47 (5)					
3.1-4		21.27 (31)	24.35 (120)	26.39 (162)	34.58 (53)	38.72 (15)	47.76 (14)						
2.1-3	18.58 (20)	21.23 (64)	24.62 (98)	28.41 (79)	34.65 (2)	36.90 (1)	43.67 (3)						
2 and under	24.95 (3)	28.50 (1)	34.71 (2)	27.89 (1)									
Number of trips	(24)	(102)	(283)	(337)	(217)	(62)	(74)	(15)	(20)	(8)	(5)	(4)	(1,171)

Source: Presidential Railroad Commission's pay structure study of 31 railroads, July 1-Dec. 31, 1960.

TABLE 3. AVERAGE TRIP EARNINGS BY NUMBER OF MILES RUN AND HOURS WORKED FOR CONDUCTORS IN PASSENGER STRAIGHTAWAY SERVICE, JULY 1-DEC. 31, 1900

[Each box shows average earnings and number of trips (in parentheses) for indicated miles run and hours worked]

Number of hours worked	Number of miles run											Total number of trips		
	75 and under	76-100	101-125	126-150	151-175	176-200	201-225	226-250	251-275	276-300	301-325		326-350	351 and over
13.1 and over.....										\$30.90 (1)			\$30.64 (2)	
12.1-12.....						\$31.87 (3)							\$31.64 (2)	
11.1-12.....									\$37.75 (3)	\$30.78 (1)	\$42.70 (1)	\$54.45 (2)	\$77.20 (1)	
10.1-11.....									\$22.45 (3)				\$31.38 (1)	
9.1-10.....						\$33.00 (1)		\$35.34 (3)		44.24 (1)	42.34 (1)	47.75 (2)	\$31.64 (2)	
8.1-9.....							\$30.25 (1)	\$71.25 (3)	42.08 (3)	31.96 (1)	31.86 (1)	48.87 (3)	\$31.81 (1)	
7.1-8.....						28.21 (2)	31.47 (4)	33.32 (3)	38.87 (4)	30.67 (3)	34.12 (13)	48.02 (4)	\$31.38 (1)	
6.1-7.....					\$23.74 (1)	27.15 (2)	28.86 (4)	28.75 (3)	34.21 (7)	30.66 (20)	42.41 (11)	44.57 (13)		
5.1-6.....				\$30.95 (1)	24.21 (3)	28.16 (30)	28.33 (38)	33.13 (20)	32.45 (15)	40.76 (34)		46.24 (4)		
4.1-5.....	\$33.46 (1)		31.54 (3)	28.77 (2)	24.18 (35)	26.15 (60)	26.05 (60)	32.35 (16)	35.49 (4)					
3.1-4.....		\$30.64 (2)	26.30 (13)	25.90 (41)	22.24 (38)	25.40 (39)	28.23 (27)							
2.1-3.....	7.80 (1)	26.64 (1)	17.76 (21)	22.54 (7)	20.90 (9)	22.62 (1)	27.71 (1)			40.32 (1)				
2 and under.....	11.63 (5)													
Number of trips.....	(7)	(3)	(46)	(73)	(81)	(144)	(70)	(56)	(41)	(102)	(40)	(38)	(31)	(798)

Source: Presidential Railroad Commission's pay structure study of 31 railroads for July 1-Dec. 31, 1900.

TABLE 4. AVERAGE TRIP EARNINGS BY NUMBER OF MILES RUN AND HOURS WORKED FOR ENGINEERS IN THROUGH FREIGHT SERVICE, JULY 1-DEC. 31, 1900

[Each box shows average earnings and number of trips (in parentheses) for indicated miles run and hours worked]

Number of hours worked	Number of miles run										Total number of trips
	60 and under	61-80	81-100	101-120	121-140	141-160	161-180	181-200	201-220	221-240	241 and over
14.1 and over.....		\$51.07 (1)	\$46.89 (1)		\$70.03 (3)	\$53.75 (2)	\$68.70 (1)	\$57.05 (1)	\$54.42 (1)		
13.1-14.....			62.71 (1)	\$45.02 (1)	46.77 (1)	44.37 (3)	44.56 (1)				
12.1-13.....		41.80 (1)			43.37 (1)		51.77 (5)	52.37 (1)			
11.1-12.....		40.17 (3)	35.95 (1)	40.55 (3)	41.04 (4)	45.47 (3)	50.02 (9)	55.84 (1)	55.84 (1)		
10.1-11.....		40.73 (1)	36.11 (5)	38.31 (2)	38.40 (13)	38.86 (2)	47.33 (9)	62.94 (3)	55.25 (3)	58.71 (1)	
9.1-10.....	\$20.49 (2)	30.50 (2)	30.64 (7)	27.94 (6)	27.76 (17)	45.27 (5)	46.24 (9)	50.14 (1)	57.05 (2)		
8.1-9.....	26.85 (1)	28.00 (4)	31.09 (11)	31.91 (19)	34.27 (20)	41.14 (18)	46.28 (9)	50.37 (3)	51.43 (2)	57.39 (2)	\$70.69 (2)
7.1-8.....	27.48 (3)	28.24 (5)	28.53 (24)	29.06 (39)	33.33 (51)	36.72 (27)	43.22 (37)	48.06 (2)	50.90 (3)	53.01 (1)	70.96 (1)
6.1-7.....	32.78 (3)	34.95 (14)	28.57 (46)	29.03 (49)	33.17 (62)	36.62 (57)	41.92 (39)	49.84 (3)	56.02 (1)	67.57 (1)	
5.1-6.....	27.52 (4)	28.06 (32)	28.90 (65)	29.18 (120)	34.92 (107)	36.30 (93)	44.10 (35)	50.27 (10)	46.90 (4)		
4.1-5.....	28.44 (5)	28.76 (47)	28.72 (81)	28.62 (173)	34.80 (102)	36.20 (85)	47.10 (5)	51.38 (2)			
3.1-4.....	27.36 (5)	28.25 (47)	28.99 (72)	28.26 (137)	33.83 (83)	37.57 (39)					
3 and under.....	31.99 (6)	28.50 (9)	27.47 (27)	28.20 (66)	32.93 (11)						
Number of trips.....	(30)	(106)	(336)	(607)	(463)	(295)	(121)	(30)	(16)	(5)	(4)
											(2,000)

Source: Presidential Railroad Commission's pay structure study of 81 railroads for July 1-Dec. 31, 1900.

TABLE 5. AVERAGE TRIP EARNINGS BY NUMBER OF MILES RUN AND HOURS WORKED FOR CONDUCTORS IN THROUGH FREIGHT SERVICE,
JULY 1-DEC. 31, 1960

[Each box shows average earnings and number of trips (in parentheses) for indicated miles run and hours worked]

Number of hours worked	Number of miles run										Total number of trips
	60 and under	61-80	81-100	101-120	121-140	141-160	161-180	181-200	201-220	221-240	241 and over
14.1 and over			\$32.14 (1)		\$42.85 (1)	\$40.72 (1)	\$45.80 (1)				
13.1-14					\$7.07 (3)		41.78 (1)				
12.1-13				\$37.90 (1)			39.01 (1)				
11.1-12				33.32 (3)	38.78 (3)	30.92 (1)	44.45 (2)	\$48.01 (2)			
10.1-11		\$30.56 (2)	31.87 (2)	31.45 (9)	31.78 (6)	35.28 (3)	42.70 (3)	38.17 (1)			
9.1-10			28.24 (4)	28.00 (2)	30.85 (4)	34.13 (3)	35.97 (2)		\$50.12 (1)	\$52.80 (1)	
8.1-9		24.00 (1)	28.84 (6)	28.51 (8)	30.85 (14)	35.77 (13)	39.51 (10)	42.78 (1)	\$53.47 (1)	50.80 (2)	
7.1-8			28.80 (19)	28.04 (19)	30.44 (22)	34.79 (15)	39.04 (13)		50.28 (1)		
6.1-7	\$25.91 (2)	24.94 (3)	23.64 (25)	27.01 (31)	28.28 (42)	34.70 (35)	38.99 (17)		43.20 (2)		
5.1-6		24.35 (2)	23.11 (35)	25.43 (45)	26.68 (57)	32.96 (47)	38.63 (15)	40.12 (1)	42.66 (1)		
4.1-5		24.92 (13)	22.64 (45)	24.01 (80)	26.31 (71)	32.62 (28)	37.24 (11)	40.12 (2)	41.31 (1)		
3.1-4		24.72 (9)	21.03 (35)	23.64 (53)	28.06 (50)	30.88 (11)	38.82 (4)	40.12 (1)			
3 and under	20.75 (1)	22.22 (9)	21.68 (15)	22.59 (15)	26.91 (15)						
Number of trips...	(4)	(39)	(191)	(306)	(278)	(155)	(80)	(9)	(6)	(2)	(3)
											(1,076)

Source: Presidential Railroad Commission's pay structure study of 31 railroads, July 1-Dec. 31, 1960.

TABLE 6. AVERAGE TRIP EARNINGS BY NUMBER OF MILES RUN AND HOURS WORKED FOR ENGINEERS IN LOCAL FREIGHT SERVICE,
JULY 1-DEC. 31, 1960

[Each box shows average earnings and number of trips (in parentheses) for indicated miles run and hours worked]

Number of hours worked	Number of miles run												Total number of trips			
	30 and under	31-40	41-50	51-60	61-70	71-80	81-90	91-100	101-110	111-120	121-130	131-140		141-150	151-160	161 and over
15.1 and over	\$54.13 (3)	\$53.36 (5)	\$57.20 (2)	\$57.07 (2)	\$53.60 (4)	\$55.06 (7)	\$63.00 (5)	\$54.58 (4)	\$55.67 (6)	\$57.00 (3)	\$57.00 (3)	\$61.38 (2)	\$56.20 (4)	\$51.06 (3)		
14.1-15	\$52.00 (3)	\$51.81 (1)	\$51.14 (2)	\$50.97 (0)	\$50.97 (0)	\$51.30 (2)	\$48.25 (4)	\$56.07 (2)	\$50.90 (3)	\$45.07 (4)	\$45.22 (3)	\$45.02 (2)	\$61.38 (2)	\$46.06 (1)	\$46.84 (2)	
13.1-14	\$46.55 (2)	\$46.44 (4)	\$46.82 (3)	\$46.98 (3)	\$46.98 (3)	\$47.10 (7)	\$55.04 (1)	\$44.23 (4)	\$44.23 (4)	\$45.37 (4)	\$45.31 (7)	\$45.31 (7)	\$45.52 (2)	\$46.84 (2)		
12.1-13	\$45.55 (1)	\$45.20 (4)	\$45.22 (3)	\$45.22 (3)	\$45.22 (3)	\$45.22 (3)	\$45.20 (2)	\$42.82 (1)	\$40.16 (4)	\$40.42 (6)	\$40.32 (2)	\$40.45 (1)	\$38.02 (3)	\$45.82 (6)		
11.1-12	\$40.15 (4)	\$38.88 (2)	\$38.28 (0)	\$41.25 (3)	\$41.25 (3)	\$40.01 (7)	\$36.00 (2)	\$42.15 (7)	\$38.27 (11)	\$38.00 (13)	\$33.40 (3)	\$37.04 (4)	\$38.74 (2)	\$38.11 (4)	\$47.00 (4)	
10.1-11	\$38.34 (3)	\$32.70 (0)	\$32.70 (3)	\$34.18 (0)	\$34.09 (7)	\$34.01 (4)	\$34.11 (7)	\$36.64 (4)	\$34.06 (8)	\$31.91 (6)	\$22.22 (3)	\$27.61 (4)	\$35.42 (3)	\$31.93 (3)	\$45.04 (6)	
9.1-10	\$31.51 (4)	\$30.62 (2)	\$28.90 (4)	\$28.90 (4)	\$33.94 (2)	\$29.94 (6)	\$33.20 (6)	\$22.60 (4)	\$31.06 (8)	\$22.12 (4)	\$30.02 (2)	\$34.74 (3)	\$28.27 (6)	\$35.62 (7)	\$42.00 (3)	
8.1-9	\$26.28 (0)	\$31.03 (3)	\$25.51 (1)	\$25.51 (1)	\$35.90 (1)	\$25.51 (1)	\$25.50 (7)	\$26.87 (6)	\$30.82 (3)	\$30.45 (10)	\$35.91 (2)	\$38.17 (3)	\$36.23 (7)	\$40.20 (3)		
7.1-8	\$23.00 (4)	\$23.35 (6)	\$22.32 (1)	\$22.32 (1)	\$28.09 (2)	\$25.17 (2)	\$22.52 (2)	\$27.90 (8)	\$26.21 (3)	\$30.42 (10)	\$25.05 (4)	\$28.41 (3)	\$33.46 (4)	\$31.57 (3)	\$43.34 (3)	
6.1-7	\$23.40 (1)	\$26.36 (0)	\$25.71 (3)	\$25.69 (2)	\$33.06 (2)	\$23.04 (2)	\$26.54 (2)	\$28.16 (6)	\$24.90 (2)	\$26.52 (4)	\$30.13 (4)	\$34.35 (6)	\$37.45 (1)	\$34.61 (6)	\$48.06 (1)	
5.1-6	\$26.11 (1)	\$24.32 (1)	\$24.91 (4)	\$25.35 (2)	\$27.80 (2)	\$22.88 (3)	\$22.34 (3)	\$22.51 (8)	\$24.87 (2)	\$22.25 (4)	\$31.96 (3)	\$34.08 (1)	\$37.45 (1)	\$34.61 (6)	\$48.06 (1)	
4.1-5	\$25.11 (1)	\$26.00 (2)	\$27.15 (4)	\$27.15 (4)	\$27.80 (2)	\$22.88 (3)	\$22.34 (3)	\$22.51 (8)	\$24.87 (2)	\$22.25 (4)	\$31.96 (3)	\$34.08 (1)	\$37.45 (1)	\$34.61 (6)	\$48.06 (1)	
4 and under	\$25.00 (4)	\$24.32 (1)	\$25.96 (3)	\$25.96 (3)	\$27.80 (2)	\$22.88 (3)	\$22.34 (3)	\$22.51 (8)	\$24.87 (2)	\$22.25 (4)	\$31.96 (3)	\$34.08 (1)	\$37.45 (1)	\$34.61 (6)	\$48.06 (1)	
Number of trips	(32)	(19)	(56)	(31)	(31)	(42)	(56)	(60)	(53)	(56)	(57)	(50)	(30)	(30)	(30)	(554)

Source: Presidential Railroad Commission's pay structure study of 81 railroads, July 1-Dec. 31, 1960.

TABLE 7. AVERAGE TRIP EARNINGS BY NUMBER OF MILES RUN AND HOURS WORKED FOR CONDUCTORS IN LOCAL FREIGHT SERVICE,
JULY 1-DEC. 31, 1900

[Each box shows average earnings and number of trips (in parentheses) for indicated miles run and hours worked]

Number of hours worked	Number of miles run															Total number of trips
	30 and under	31-40	41-50	51-60	61-70	71-80	81-90	91-100	101-110	111-120	121-130	131-140	141-150	151-160	161 and over	
16.1 and over.....			\$20.99 (1)	\$21.23 (2)	\$24.07 (2)	\$20.99 (9)	\$23.27 (6)	\$20.14 (2)	\$28.90 (1)	\$43.96 (6)	\$43.65 (6)	\$44.27 (7)	\$46.90 (3)	\$45.43 (1)	\$44.06 (7)	
14.1-15.....			45.27 (2)	44.41 (5)	44.09 (1)	46.78 (2)	45.71 (4)	47.27 (1)	50.78 (2)	46.55 (2)	42.72 (1)	43.97 (4)	43.76 (1)	39.45 (7)	39.45 (7)	
13.1-14.....	\$22.31 (6)	\$42.74 (2)	43.70 (1)	40.70 (1)	44.09 (1)	42.36 (2)	43.64 (6)	41.36 (0)	42.90 (2)	48.87 (3)	37.33 (2)	40.91 (4)	38.50 (1)	38.15 (1)	39.83 (6)	
12.1-13.....	24.08 (1)	39.31 (2)	38.86 (1)	39.42 (1)	39.05 (4)		39.04 (4)	43.70 (1)	37.56 (2)	33.41 (2)	36.74 (1)	36.02 (3)	36.30 (2)	40.28 (3)	40.28 (3)	
11.1-12.....		33.41 (1)	33.41 (1)	30.72 (2)	44.47 (2)	35.78 (1)	36.27 (2)	36.70 (6)	34.43 (3)	34.29 (4)	30.99 (3)	22.31 (1)	42.91 (5)	36.48 (3)	39.96 (3)	
10.1-11.....	29.81 (1)	29.95 (3)	29.95 (3)	26.67 (6)	21.50 (2)	30.95 (6)	31.57 (5)	31.54 (4)	29.73 (3)	31.63 (4)	30.35 (1)	31.38 (4)	32.06 (1)	23.06 (7)	23.36 (4)	
9.1-10.....		30.60 (1)	28.04 (1)	27.25 (1)	28.61 (3)	28.18 (3)	32.17 (4)	30.03 (2)	28.09 (3)	31.09 (10)	25.80 (2)	25.17 (1)	34.15 (2)	35.07 (8)	38.82 (3)	
8.1-9.....	24.48 (4)	22.10 (1)		23.31 (1)	23.77 (1)	23.57 (2)	23.72 (3)	24.50 (2)	21.86 (3)	26.05 (1)	23.49 (1)	26.55 (2)	32.00 (2)	34.41 (2)	40.22 (5)	
7.1-8.....	21.61 (7)	21.05 (2)	21.22 (14)	21.14 (5)	23.61 (4)	22.15 (4)	22.25 (8)	21.39 (6)	24.55 (1)	26.97 (6)	27.13 (2)	28.53 (7)	32.00 (1)	36.54 (1)	36.54 (1)	
6.1-7.....	21.05 (1)	21.05 (2)	21.67 (4)	23.29 (8)	24.36 (5)	22.34 (7)	21.86 (4)	22.30 (8)	21.00 (2)	27.20 (7)	27.42 (5)	30.52 (2)	32.00 (2)			
5.1-6.....	20.98 (1)	21.05 (1)	22.30 (3)	21.12 (1)	21.03 (6)	21.93 (6)	22.61 (6)	22.00 (2)	23.12 (3)	24.62 (4)	27.64 (6)	30.31 (1)	32.00 (2)			
4.1-5.....		21.77 (1)	21.77 (1)	21.09 (1)	20.32 (1)	21.35 (6)	22.34 (2)	21.25 (1)		23.09 (6)	27.52 (1)					
4 and under.....	21.25 (3)	21.77 (2)	21.77 (2)	21.11 (1)		21.27 (6)	21.27 (2)			25.00 (2)	32.94 (2)					
Number of trips.....	(22)	(12)	(33)	(41)	(47)	(47)	(49)	(43)	(29)	(60)	(31)	(60)	(20)	(22)	(38)	(246)

Source: Presidential Railroad Commission's pay structure study of 31 railroads, July 1-Dec. 31, 1900.

CHAPTER 9

Wage Structure: Proposals and Recommendations

The preceding chapter described the major components of the wage system applicable to operating employees on the railroads and briefly summarized the present structure of earnings which the complex of pay rules produces under current operating conditions. This chapter first outlines the proposals made by the parties to modify the pay rules and then presents the analysis of the wage structure made by the Commission, followed by its recommendations for changing gradually over a period of years the pay rules, hours, and the earnings relationships they yield.

The Proposals

The principal features of the proposals of the parties for revision in the pay rules are summarized according to the major components of the wage structure identified in the previous chapter. The proposals of the parties are summarized together under each component for all classes of service. But the impact of the proposals relating to each separate component of the wage structure can be fully understood only when they are seen as a whole since the separate pay rules are highly interdependent.

(a) *Dual Basis of Pay.* The Carriers propose to reduce the mileage rates of pay in passenger and through freight service—but not in local freight service—while they propose no changes in the general levels of the daily rate components of the dual basis of pay in any class or grade of service. The proposal would require an increase in the number of miles which constitute the basic day. Specifically, in through freight service and for engineers and firemen in passenger service—where 100 miles now constitute the basic day—the Carriers propose to increase the basic day to 160 miles. The mileage rate would then be computed by dividing the unchanged daily rate by 160 miles instead of the present 100 miles; this proposal constitutes a 37.5 percent reduction in the mileage rate. In passenger service, for conductors and trainmen, where 150 miles now constitutes the basic day, the

Carriers propose to increase the basic day to 225 miles, a reduction of 33.3 percent in the mileage rate.

The Organizations propose no changes in the mileage rates of pay, but they propose a reduction in the hours of the basic day, and in the workweek or workmonth in each service without any reduction in daily, weekly, or monthly take-home pay. The proposal has the effect of increasing the basic daily rate component of the dual basis of pay. The proposals of the Organizations for the separate classes of service are as follows:

THROUGH FREIGHT SERVICE. A 6 hour basic day and a 26 day work month. (Presently an 8 hour basic day and a 30 day work month.)

STRAIGHTAWAY PASSENGER ENGINE SERVICE. A 4 hour basic day and a 26 day work month. (Presently a 5 hour basic day and a 30 day work month.)

STRAIGHTAWAY PASSENGER TRAIN SERVICE. A 6 hour basic day and a 26 day work month. (Presently a 7½ hour basic day and a 30 day work month.)

LOCAL FREIGHT SERVICE. A 7 hour basic day and a 5 day workweek. (Presently an 8 hour basic day and a 6 or 7 day workweek.)

YARD SERVICE INCLUDING BELT LINE, TRANSFER AND HOSTLER SERVICE. A 7 hour basic day and a 5 day workweek. (Presently an 8 hour basic day and a 5 day workweek, except for engineers for whom it may be 6 or 7 days.)

Thus, in through freight service the proposal of the Organizations provides that 6 hours or less, 100 miles or less shall constitute a basic day and "basic unit of work" at a higher basic daily rate which offsets the reduction in the work month. One effect of the proposal in through freight and passenger engine service would be to increase the number of miles which constitutes the basic day from 100 to 115.4 miles (the ratio of 30 days to 26 days) in order to maintain monthly take-home pay. The mileage equivalent of the basic day in passenger train service would be increased from 150 to 173.1 (the ratio of 30 days to 26 days) in order to maintain monthly take-home pay. In local freight service employees would earn the equivalent of pay for a basic day after 140 miles run (the ratio of 7 days to 5 days applied to 100 miles). The proposal for the reduced basic day for yard service employees provides that wage adjustments accompanying past reductions in the work week should be completely resurveyed to correct any remaining conversion inequities.

(b) *Overtime.* The Carriers propose in through freight service that the speed basis of overtime be changed from the present 12½

miles per hour to 20 miles an hour to accord with the proposed increase in the mileage equivalent of the basic day from 100 miles to 160 miles. Through freight employees under this proposal would receive overtime pay at $1\frac{1}{2}$ times the hourly rate for overtime hours when on duty in excess of 8 hours and averaging less than 20 miles per hour. They now receive $\frac{3}{16}$ the daily rate when they are on duty in excess of 8 hours and average less than $12\frac{1}{2}$ miles per hour. In straightaway passenger service, where overtime has been infrequent, the Carriers propose the elimination of the overtime rules; this would have the effect of increasing the overtime rate because the overtime rate has been below the straight time hourly rate. In short turnaround passenger service, in assigned local freight service and yard service, under the Carrier proposals, the overtime rules would remain substantially unchanged.

The Organizations propose to abandon the speed basis for determining the threshold of overtime in road service and to provide instead that overtime shall be paid in all classes of service (except short turnaround passenger service) after the expiration of the hours constituting the basic day as proposed by the Organizations, or for work performed outside the regular assignment, and for work performed on any assigned day off. The overtime rate proposed is time and one-half the applicable hourly or mileage rate, whichever is greater. In short turnaround passenger service, the Organizations propose time and one-half for all time in excess of 7 hours within 9 consecutive hours and for all hours in excess of 9, for work performed outside the regular assignment, and for all time on the 6th or 7th day of any workweek.

In local freight service, the Organizations also propose time and one-half for the 6th or 7th day of any workweek. The Organizations further propose that road service employees, other than in through freight and passenger service, be paid time and a half for any second assignment, call, or unit of work beginning within the calendar day in which the first unit of work started, or within 10 hours of the conclusion of the first unit of work if that unit overlaps a calendar day, and they also propose in yard service that employees working a second shift in a 24-hour period be paid time and a half.

(c) *Graduated Rates of Pay.* The Carriers propose to abolish the present schedules under which the compensation of engine service employees varies with the weight of the power (weight on drivers in pounds) used in the locomotives in all classes of service and under which the compensation of conductors and trainmen in through and local freight service varies with the maximum number of cars hauled in the train in a road movement. The Carriers propose, with some exceptions to be noted, a single rate for each craft in each class of service which would abolish graduated rates and incorporate the

weighted average graduation now paid into the basic daily and mileage rates. The proposal is intended in principle to preserve the present average level of graduated pay but to eliminate the graduated schedules. In regard to the rates for the fireman helper in all classes of service, the Carriers propose that the new daily and mileage rates be based upon the minimum of the present graduated brackets rather than upon the weighted average graduated brackets currently in effect. In regard to passenger baggagemen, where there are a number of different classifications with different rates, the Carriers propose that the new daily and mileage rate schedules, after adjustment for their proposal for a lower mileage rate, be that for the minimum of the passenger baggageman classification. The Carriers' counsel further stated:

It is the considered judgment of the majority (perhaps of all) of the representatives of the Carriers, that have considered the matter, that the rates of pay provided by the Carriers' proposal for passenger baggagemen, for firemen in all classes of service, and for brakemen in through freight and passenger service are too high. When your Commission comes to a consideration of these rates of pay, I anticipate that you will recommend that the rates which have been proposed by the Carriers for these classes of employees should be reduced.

He added later, "It may be after you consider this evidence that you will wish to add to this list . . ."

The Organizations reject the proposals of the Carriers for the elimination of graduated rates of pay.

(d) *Guarantees.* The Carriers propose to eliminate all trip, daily, weekly, and monthly guarantees that are in excess of the guarantee of a minimum day. (These guarantees are briefly summarized by classes of service in the preceding chapter.) The Carriers propose that the minimum earnings from all sources for each hour of duty shall be not less than straight time rates for the standard day: 5 hours in passenger engine service, 7½ hours in passenger train service, and 8 hours in freight, yard, and short turnaround passenger service.

The Organizations reject the proposals of the Carriers that any of the present guarantees be eliminated, and they propose that the pay rules provide for the following additional guarantees, provided that guarantees more favorable to the employees on individual railroads should be retained:

THROUGH FREIGHT AND STRAIGHTAWAY PASSENGER SERVICE. Pay for 26 basic days a month.

SHORT TURNAROUND PASSENGER SERVICE. Pay for 5 basic days a week and pay for 22 basic days a month.

ALL OTHER CLASSES OF ROAD SERVICE. Pay for 22 basic days a month, and in the case of engine service employees also pay for 5 basic days a week.

YARD, BELT LINE, TRANSFER AND HOSTLER SERVICE. Pay for 5 basic days a week and pay for 22 basic days a month.

These guarantees are proposed exclusive of overtime and other compensation and at the average of the applicable graduated rates of pay. The Organizations further propose that if an employee is not "available" all month, he should receive the monthly guarantee pro rata for those days on which he is "available."

(e) *Arbitraries and Special Allowances.* The Carriers propose the elimination of all pay rules which "... provide for arbitrary payments, or special or constructive allowances, which conflict with the payment of single time in miles or hours from time called to report for duty until released from duty."

The Organizations reject the proposal of the Carriers, and they propose instead that pay rules relating to arbitraries and special allowances be revised, so that, instead of being stated in dollar or mileage terms, they would be expressed in hours or minutes and in the future adjusted with basic hourly rates. Conversion from money or mileage to time equivalents, the Organizations propose, shall be on an equitable basis but at not less than the relationship existing November 1, 1959.

(f) *Higher-Than-Standard Rates.* The Carriers propose the elimination of all pay rules which provide for higher-than-standard rates such as are paid on some railroads or on certain divisions to employees in mine run, road switching, roustabout and other miscellaneous classes of service, to some employees in local freight and yard service, and to other employees in the form of mountain or desert differentials or for other reasons.

The Organizations reject the proposal of the Carriers, and they propose no change in higher-than-standard rates. In connection with the proposal of the Organizations to reduce the work day, work week and work month, it is to be recalled they proposed that there be no reduction in take-home pay, including compensation from higher-than-standard rates.

(g) *Mileage Limitation Rules.* The Carriers propose the elimination of all pay rules which "... impose restrictions on weekly, monthly or annual earnings through the limitation of miles run or paid for, hours worked or paid for or compensation received."

The Organizations reject the proposal of the Carriers.

(h) *Split-Trip Compensation.* The Organizations propose that a pay rule be added providing in road service, other than short turnaround passenger service, that "... any assignment or combination of assignments having one or more intervals of release of less than ten (10) hours within or between assignments shall be considered a split trip." The Organizations further propose that "... in addi-

tion to all other compensation, additional half time shall be paid on such split trips for all time in excess of ten (10) hours between the time of first reporting for duty and final release." In short turn-around passenger service a split trip shall be defined as any assignment with an interval of release of more than one hour and shall be paid additional compensation as proposed above for all other classes of service.

The Carriers reject the proposal of the Organizations.

(i) *Fringe Benefits.* The Organizations proposed additional pay rules relating to night work differentials, holidays with pay, and away-from-home terminal expenses. These proposals, including the position of the Carriers on these proposals, are set forth in the next chapter.

General Comments on Proposals

A few general comments at this juncture on the preceding brief survey of the proposals of the Organizations and the Carriers relative to pay rules may add understanding to these proposals and the analysis and discussion which follow.

(1) The proposals of the parties taken together involve a very far-reaching revision of the compensation arrangements for operating employees. Even after these proposals have been discounted by some factor to recognize that they are formal initial proposals, it is clear that as a group these proposals in their scope and extent envisage something quite different from the usual desire for "a little more" or "a little less." The proposals involve changes in features of the compensation system that have prevailed for at least the past 40 years.

(2) The pay proposals of the Carriers, taken as a whole, would clearly have the effect of materially reducing the earnings of the employees on the average, at least as measured on an hourly and weekly basis. The effect upon monthly and annual earnings is probably in the same direction but would depend in part upon the extent of the subsequent increase in hours on duty and miles run. If hours on duty or miles run are increased, total employment levels would be reduced in the absence of a rise in railroad business. The proposals of the Carriers would also no doubt substantially reduce labor costs per ton or passenger mile. This statement of the impact of the Carriers' proposals on earnings is made in part on the basis of the effects of their proposals upon earnings as reported by the Carriers in their study of three railroads; it is made despite their statement that their proposals by their terms "... accept the general level of rates and earnings in the railroad industry as it finds it, and seeks to restore fair and equitable intraindustry wage and earnings relationships at that level."

The proposals of the Organizations, just as clearly, would materially increase the levels of compensation on the average, and they are designed to increase the employment levels required on the railroads. The proposals of the Organizations, taken as a whole, would no doubt substantially increase labor costs per ton or passenger mile.

Thus, in the form these proposals are presented to the Commission, those of the Carriers on the average would substantially reduce compensation and labor costs while those of the Organizations on the average would substantially increase compensation and labor costs. There is, however, no proposal before the Commission providing for a general, across-the-board, wage increase or decrease. Moreover, the proposals of the parties would affect in some respects the current differentials among classes of service and occupational groups.

(3) The proposals of the parties with respect to the dual basis of pay and associated overtime rules in passenger and through freight service reflect a significant dichotomy. The dual basis of pay, it will be recalled, involves both a mileage and a daily rate component of compensation. The proposals of the Carriers reduce the mileage rates, leaving the daily rates with a few exceptions unchanged. The proposals of the Organizations leave mileage rates unchanged but reduce hours in the basic day and reduce days worked per month and so increase the basic daily rates in order to maintain take-home pay. The Carriers focus the attention of their proposals on the mileage rates, while the Organizations center their attention on the daily rates.

Guideposts to the Compensation Discussion

No one can relate the proposals of the parties to the mass of wage data concerning rates, earnings, and pay rules presented by the parties or to the even larger bulk of tabulations developed by the Commission in its Pay Structure Study without certain ideas or guideposts concerning the task of the Commission. It is imperative that these guideposts be made explicit; they were shaped both by the clash of ideas of the parties and by contemplation of the data. These guideposts provide a perspective from which to proceed to an appraisal of the current pay rules and the recommendations to follow.

(1) The agreement of October 17, 1960 creating this Commission provided that the "... Commission shall proceed in general conformity with the recommendations of Emergency Board 109" but that the report of the Emergency Board "... shall have no binding effect upon the Commission in making its findings and recommendations." The recommendation of that Board was as follows:

There should be established a commission to review and to modernize the wage rate structure of the operating classifications in the railroad industry. We believe that such a comprehensive review is long overdue and is essential

to the correction of wage inequities, to mutually constructive industrial relations and to the efficient operation of the railroads. It is recommended that such a commission be established in accordance with the principles and guideposts outlined in the above discussion.

The most important principles and guideposts set forth in the report of Emergency Board 109, which was dated March 25, 1955, may be briefly listed as follows in the language of that report:

- Every wage rate, differential, element of compensation and pay rule for an operating classification appears to have a close relationship to the wage structure of other operating classifications. . . . all operating employees are particularly sensitive to the changes in the wage structure of other operating employees.
- Comprehensive reviews and revisions of wage structures have become common in American industry in the past ten years. . . . Indeed the concern with simplification and modernization of internal wage structures is one of the most significant developments of industrial relations in the United States in the past decade.
- It is the experience of American industry that the administration of a wage structure and incentive system is as significant for labor costs, and frequently more so, than changes in the general level of wage rates. It should be possible to revise the rate structure to increase daily and annual earnings of the employees and yet to reduce labor costs per ton-mile and per passenger-mile.
- It is axiomatic that a piece rate or incentive system must be kept up to date, with changing conditions and technology, or it will develop serious inequities in earnings, and more important, it will then cease to provide any genuine incentive for increased output which brings lower costs and higher earnings. The standards of a piecework system need review with changes in job content and operations. It is agreed that the mileage basis of pay is a form of piece rate method of compensation.
- . . . the term "wage structure" is used to denote the whole complex of wage rates, methods and bases of wage payments, rules governing the mileage basis of pay and overtime, graduated rates of pay, region and other differentials, and all other rules governing compensation.

[An issue of intercraft differentials was the sole issue involved in the proceedings before Emergency Board 100. The suggestion for a commission grew from the inherent necessity of having all five operating labor organizations in one proceeding if intercraft wage differentials were to be systematically considered]

- The objective is not to change the general level of rates but to reorganize the structure and pay rules.
- It has been the experience of industry generally that improved wage rate structures pay for themselves, while they may result in some initial rise in average earnings.
- This report does not contemplate any mechanical system of job evaluation or other formula for setting wages. A systematic survey of various job duties is essential to a wage review. The wage rate structure should be established by negotiations after a complete survey and a thorough review of the wage structure.

These guideposts are not binding on this Commission, but they provide a significant starting point in view of the agreement between the parties creating the Commission.

(2) The distinction between the *level* and the *structure* of wages or compensation of operating employees is central to an understanding of the approach of this Commission to the wage and compensation issue. The level refers to the overall position of wages or compensation for these employees as a whole compared to the wages or compensation of nonoperating employees as a whole in the railroad industry or, perhaps more importantly, to wages or compensation in manufacturing industry or in the economy as a whole. The structure of wages or compensation, by contrast, refers to the vast complex of differentials among different classes of service, crafts, job classifications, regions, railroads, divisions, runs, and individual workers within the operating group of employees.

While these concepts are clearly differentiated, they are not always so easy to separate in statistical terms. Thus, a change in wages or compensation on even a single run—clearly a change in the structure of differentials—will affect to an infinitesimal extent the arithmetic average of wages or compensation of all operating employees. Changes in wages or compensation of one class of service or one occupation as a whole will have a more pronounced effect on the average wage for all operating employees. Changes in the level are not necessarily to be identified with any change in the arithmetic average. On the other hand, changes in the structure of wages or compensation may become so widespread and so significant that they constitute the equivalent of a change in the level. Despite these complications, the distinction between level and structure of wages or compensation is a useful and fundamental starting point, and a number of propositions are related to this distinction which help to define the approach of this Commission.

(a) The Commission regards its task as concerned with wage and compensation structure questions rather than with the level. The level of wages or compensation of operating employees is not an issue before the Commission, and we express no views on contending positions over the proper compensation levels of operating employees compared to nonoperating employees or to those in other industries or in the economy generally. The Commission is basically concerned with the rearrangement of the wage and compensation structure and with associated questions of the method of wage payment within the general limits of the present level.

(b) It is generally difficult to compute the yield in average earnings of a reorganized wage or compensation structure. To

compare new average earnings with old averages, moreover, does not necessarily provide a reliable index of a change in the level or even in the direction of its change. The yield in earnings resulting from changes in pay rules may not be fully realized except over a period of years, and the initial impact on earnings may be different from the longer-term effects. In general, a revision in the wage structure of operating employees may be expected to be associated with some upward adjustment in average earnings as has been the case in wage structure revision in other major industries. However, some changes in wage structure can be accompanied by no increase, and even a decrease in labor costs per ton and passenger mile with rearrangements in operations.

(c) Our concentration upon wage structure rather than level carries with it the implication that considerations of ability to pay have not been a decisive criterion in the present task of the Commission. We are not here concerned with significant changes in the relationship between the total wage bill and output.

(d) The concentration upon wage structure further implies that the recommendations of the Commission have no bearing on positions of the parties with regard to general wage rate changes and do not prejudice one way or the other positions of the parties respecting the amount of future general wage changes.

(e) The question arises as to the way in which so-called fringe items are to be related to the level or structure of wages and compensation. Pay rules specifying fringes influence both level and structure. Fringes clearly constitute a part of total compensation. This view accords with the general practice in collective bargaining, and in the railroad industry specifically, of bargaining over a "package" settlement including all money items. The relative benefit to different groups of operating employees under fringe benefit rules, however, is properly a compensation structure problem. The present away-from-home terminal expense arrangements on the various railroads, which provide differential treatment among groups of employees for lodging expense, are an example of such a compensation structure dimension.

(3) The Commission regards its basic task relative to pay rules and compensation to be a comprehensive review of the wage and compensation structure of operating employees. It is not limited by the scope of the formal proposals of the parties, although most features of the wage and compensation structure are in fact involved directly or indirectly in the proposals of the Carriers or the Organizations. Thus, the Commission has examined carefully the compensation structure relating to differentials among crafts and job classifications in

each type of service and the differentials among classes of services. The proposals of the Carriers include changes in the basic daily wage differentials between firemen and all other crafts and the relative wage position of various classes of baggagemen in passenger service, and counsel for the Carriers urge the Commission to reduce the relative wages of brakemen in through freight and passenger service. The proposals of both parties would affect relatively the earnings relationships among the various classes of service. The Commission has reviewed the earnings relationships, the compensation system, and the pay rules as a whole including hours of work and the dual basis of pay.

(4) A distinction needs to be recognized between a rearrangement in wage or compensation differentials that arises from a change in pay rules and a rearrangement that arises out of changes in the physical and operating features of the railroads—a change in speeds, in distribution of traffic or in the length of runs. Earnings relationships in the past 40 years have been affected significantly by operating and physical changes in the railroads, and the future is likely to see still further changes. The Commission has been concerned not merely with a wage structure appropriate in its view for the immediate present, but it has also sought a wage structure for a changing railroad industry, changing in part by virtue of some of the rules changes recommended elsewhere in this report.

(5) The task of review and revision of the compensation structure of operating employees is a most complex and sensitive undertaking. The wage data to appraise adequately the present compensation structure have only recently become available in connection with the work of the Commission. The parties have not had the opportunity fully to appraise these data and to assess their full implications. They are currently concerned with a wide range of other problems and issues. The costs of a thorough going rearrangement in the wage structure could be very considerable. In these circumstances it is unlikely at this time that consensus can readily be achieved on a broad program of changes. The Commission accordingly has decided to analyze and to appraise the current compensation arrangements, to propose a limited number of initial steps which should be taken, to outline further longer run objectives and to propose a mechanism for continuing study and revision. The neglect of a generation cannot be remedied in a single negotiation, but the first steps toward a thorough revision of the wage structure should not be further delayed.

An Appraisal of the Current Compensation Structure

No wage structure is perfect, and as the Lane Commission observed shortly after World War I, "To ask of a man 'What wages should you

in justice receive?' is to ask perhaps the profoundest of all human questions." The question for 200,000 men is no less profound.

If the compensation structure of operating employees is judged, not by the measuring rod of perfection, but rather by the practical standards used in industry generally, such an appraisal would have to highlight the following major deficiencies:

(1) *Hours on duty.* There are vast differences in the hours worked per trip and per week by class of road service. In yard service the 8-hour day is standard. The following data were taken from the Commission's Pay Structure Study and relate to the last half of 1960.

Average Hours Worked Per Trip				
	Engineers	Firemen	Conductors	Brakemen
Straightaway passenger.....	4.0	3.8	5.6	6.1
Short turnaround passenger.....	8.0	8.1	7.1	7.6
Through freight.....	5.6	5.6	5.6	5.5
Converted through freight.....	8.5	8.2	8.9	7.9
Local freight.....	10.2	9.4	9.9	10.0
Yard.....	8.3	8.3	8.3	8.1

Average Hours Worked Per Week				
	Engineers	Firemen	Conductors	Brakemen
Straightaway passenger.....	25.4	24.2	32.1	31.6
Short turnaround passenger.....	44.8	-----	40.3	41.5
Through freight.....	30.3	27.6	31.6	28.3
Converted through freight.....	47.0	41.7	45.8	35.8
Local freight.....	50.8	45.9	52.8	50.4
Yard.....	46.8	39.4	40.7	37.6

Note that average hours worked per trip for engineers ranged from 10.2 hours in local freight to 4.0 hours in straightaway passenger service. Also observe that the average weekly hours for engineers were 50.8 hours in local freight compared to 30.3 hours in through freight.

The dispersion and variability is even greater than appears from such average data. In the case of engineers, for example, only 1 percent of the trips in straightaway passenger service were over 8 hours; in through freight 12 percent, in converted through freight 53 percent, and in local freight 75 percent of the trips were over 8 hours.

The contrasts between through freight and local freight engineers are further emphasized by noting that in through freight 88 percent of the trips were less than 8 hours, 65 percent were less than 6 hours, 43 percent were less than 5 hours and 20 percent were less than 4 hours; while in local freight only 25 percent of the trips were as short as 8 hours, 55 percent were over 10 hours, 30 percent were over 12 hours and 8 percent over 15 hours.

The differences between through freight and local freight are also reflected in weekly hours of work. In the case of through freight engineers, 53.9 percent work less than 30 hours a week, another 24.7 percent work between 30 and 40 hours a week, a further 14.0 percent

work between 40 and 50 hours a week and only 7.4 percent work over 50 hours a week. In contrast, 75.5 percent of local freight engineers worked 40 hours or more a week; almost 60 percent worked 50 hours or more; 34 percent worked 60 hours or more a week and 15.1 percent worked 70 hours or more a week.

It is understandable that all operating employees in road service cannot be expected to work a uniform workday or workweek and that some variation in the hours on duty per trip or per week is inherent in railroad operations. Some shorter-hour runs cannot be avoided as a practical matter. It is also understandable that senior employees after a lifetime of attachment to the industry should be given first choice in the selection of runs. The public has not always appreciated these facts.

But the extreme variation in hours on duty per trip and per week among classes of road service and among employees in the same class of service cannot be defended. The extent of these differences is unwarranted; such wide disparities cannot possibly command the respect of the American community.

It is understandable that the Carriers would stress the low hours on many through freight runs and seek to increase these hours, and it is equally to be expected that the Organizations would seek to reduce the number of hours which constitute a basic day. It is not quite so clear why both parties have not exhibited more concern with the fact that 30 percent of the local freight trips of engineers—generally representative of all crafts—involved time on duty over 12 hours per trip and 84 percent of the local freight engineers worked 60 hours or more a week.

The persistence of such extremes in hours over long periods has created a variety of vested interests in the status quo. The men in local freight service working the very long hours have been receiving considerable overtime compensation, and the men working the shortest hours in through freight and passenger service have been receiving considerable leisure. Such conditions are not easily changed. We reject the view, however, that there is an inherent right to continue indefinitely extremes of such magnitude. The extreme disparity in hours is a major deficiency of the present compensation arrangements.

There is a further feature of hours on duty among operating employees to be noted. By act of Congress in 1916 operating employees may not be kept on continuous duty more than 16 hours. Although none of the proposals of the parties suggests a reduction in this limit by collective bargaining, it may well be that the actual hours on duty are in fact influenced by this ceiling. It is to be recognized that some of these long hours arise out of breakdowns, operating delays, weather,

and other unusual occurrences, but it is clear that only a minority of these long-hour trips arise in this way.

(2) *Overtime Rates.* The overtime pay rules applicable to operating employees involve inconsistencies and anomalies, and to some degree they contribute to the wide disparities in hours and in earnings. In yard service the daily overtime rules are akin to those prevailing in industry generally where time and one half the hourly rate is paid for overtime hours, but in road service the unique speed basis of overtime applies. (See diagram in chapter 8). In freight service, as has been noted, overtime applies when the average speed for trips over 8 hours on duty falls below $12\frac{1}{2}$ miles (20 miles an hour in passenger service.) In freight service the overtime rate is $\frac{3}{16}$ the daily rate for overtime hours defined by the speed basis of overtime. In passenger service with a 5-hour engine service and a $7\frac{1}{2}$ -hour train service day, the overtime rate is below the straight time hourly rate since it is only $\frac{1}{8}$ the daily rate.

The speed basis of overtime, whatever its historical purposes, produces overtime compensation among different groups of employees which is anomalous and even bizarre. Several examples will illustrate:

- A local or through freight employee working 16 hours and running 100 miles receives more than another working 16 hours but running 200 miles. (The first man receives 8 hours at straight time and 8 hours at time and a half, since the run averages $6\frac{1}{4}$ miles per hour or below the $12\frac{1}{2}$ mile speed basis of overtime, to give a total of 20 hours' pay. The second man receives 16 hours' pay without overtime since the run averages $12\frac{1}{2}$ miles an hour.)
- One employee receives more for running 100 miles in 9 hours than another for running $112\frac{1}{2}$ miles in 9 hours. (The first employee receives overtime pay while the second does not.)
- An employee at work for 12 hours receives less pay for running 120 miles than for 100 miles, and he receives still less pay for 140 miles. (See table 1 in chapter 8.)

The extent of the disparities built into the speed basis of overtime is apparent when the distribution of hours and miles made available by the Commission's Pay Structure Study is examined. (See tables 2 to 7 in chapter 8.) For example, consider all the local freight runs that take between 12 and 13 hours. In the case of engineers, 56 percent of these trips involve overtime because the run is below 100 miles and the hours are in excess of 8; another 30 percent involve overtime plus the mileage component of pay because they run over 100 miles and their average speed is less than $12\frac{1}{2}$ miles; and the remaining 14 percent with the longest runs involve no overtime pay at all because they average in excess of the speed basis of overtime.

In through freight service only 11 percent of the total trips of engineers involve time on duty of 8 hours or more. About 1 or 2 percent of the total through freight engineer runs are over 8 hours and involve runs of less than 100 miles and hence receive overtime at $\frac{1}{16}$ the daily rate; another 2 to 3 percent of the total number of through freight engineer runs are over 8 hours and are so slow as to fall below the $12\frac{1}{2}$ mile speed basis of overtime and they are paid at the mileage rate plus $\frac{1}{16}$ the daily rate. The rest of the through freight engineer runs over 8 hours—approximately 8 percent of the total runs—receive no overtime because they are run above the speed basis of overtime even though runs are reported of over 13 hours and more than 200 miles.

In straightaway passenger service, using engineers again as an illustration, only about 1 percent of all runs were at less than 20 miles per hour, the speed used as the basis of overtime, and almost half of these runs were completed in less than the 5-hour standard day in passenger engine service. Overtime derived from the speed basis of overtime in passenger engine service is a rare occurrence although 18 percent of passenger engine service runs exceed 5 hours.

The speed basis of overtime contributes significantly to disparities in earnings among runs in a single class of service that take the same number of hours to run. Its impact is most significant on earnings in local freight and to a lesser extent in through freight service.

(3) *Wage Relationships and the Dual Basis of Pay.* The first requirement of any wage structure is to establish reasonably equitable wage rate relationships among individual employees within one occupation and one class of service. Thus, the wage relationships among different engineers in through freight service or among different conductors in straightaway passenger service deserve first attention over other wage relationships such as those among classes of service and among occupations.

The dual basis of pay, as now established, provides for compensation depending on miles run or hours on duty or on combinations of miles and hours. There are a variety of anomalies and inequities inherent in this system as may be observed from a study of table 1 in chapter 8 showing earnings per trip for through freight engineers (at the average weight on drivers) at varying combinations of miles and hours:

- An employee receives the same pay whether he runs 160 miles in 4 hours or in 12 hours and 48 minutes.
- An engineer receives \$34.33 for a run of 100 miles in 10 hours but only \$31.21 for a run of 125 miles in 10 hours.

- An engineer receives \$39.95 for a run of 160 miles in 6 hours but only \$38.71 for a run of 140 miles in 12 hours.
- An engineer receives more for running 80 miles in 13 hours than for 170 miles in 13 hours.
- An engineer receives more for running 180 miles in 5 hours than for 125 miles in 13 hours.

Simple equity among runs suggests that the dual basis of pay ought to provide in principle that compensation increase both as miles increase and as hours on duty increase. The highest compensation should be paid for the combination of the longest runs and the longest hours on duty. Lower compensation, subject to a daily minimum, should be provided for shorter runs and shorter hours on duty. In terms of table 1 in chapter 8, in principle, compensation should increase as hours on duty increase across the table, and compensation should increase as miles run increase down the table. The highest figures should be in the lower right hand corner of table 1. It should be possible to revise the dual basis of pay to provide more equitable wage relationships among employees.

The present operation of the dual basis of pay not only contains anomalies and inequities among runs, but it also does not appear to provide appropriate incentives and constraints for management. Labor costs are the same whether a train on a 160 mile run gets over the road in 6 hours or 12 hours. Such a compensation arrangement scarcely provides much of an incentive to operating management in a day in which competition among forms of transportation turns so decisively on the quality of service and speed of delivery.

It is surprising that the pay proposals advanced by the parties would not significantly affect the anomalies or inequities inherent in the dual basis of pay. An increase in the miles run for a basic day, as proposed by the Carriers, would reduce the mileage component of compensation. The Organizations' proposals for a reduction in the hours in a workday, workweek or workmonth with no reduction in take home pay, would raise the time component in compensation. But neither set of proposals would materially affect the anomalous wage relationships among individual employees working various hours and miles in the same craft and class of service.

A system of pay with such widespread and extreme anomalies is not likely to be made significantly more equitable without disadvantaging some runs, at least temporarily. The most extreme anomalies cannot practically serve as a basis from which to adjust the rest of the wage structure. Thus, if the same pay is now provided for a run of 160 miles in 12 hours as in 6 hours, an attempt to improve the relative compensation of the run which takes 12 hours may require

some absolute reduction as well as a relative disadvantage to the run of the same distance completed in 6 hours. More equitable compensation relationships among runs of varying miles and hours necessarily affect unfavorably the more favored runs. But the impact of realignments in compensation among miles and hours does not necessarily have equivalent effects upon individuals since the same individual typically may require different hours to make the same run. Thus, one individual may run 160 miles in 6 hours one day, and the run may take him 12 hours the next day.

(4) *Through Freight and Converted Through Freight.* Another anomaly in the present basis of pay is the differential in pay between through freight and converted through freight crews. In general, although there are variations in the rules among railroads, a through freight train which makes three or more stops to set out or pick up cars is designated converted through freight. These crews are compensated at the local freight rates which are 56 cents a day higher for engineers and 40 cents for firemen for the same weight on drivers, 56 cents a day higher for conductors, and 43 cents a day higher for brakemen at the same car graduations.

The average hours worked per trip for converted through freight, as shown earlier in this chapter, are longer than in through freight and the earnings per trip are also higher. These differences by occupation are as follows:

Excess of Converted Freight over Through Freight

	<i>Hours per trip</i>	<i>Earnings per trip</i>
Engineers.....	2.9	\$3.65
Firemen.....	2.6	\$1.96
Conductors.....	3.3	\$5.82
Brakemen.....	2.4	\$2.60

The higher earnings in converted through freight are not consonant with the added hours per trip. A differential of 56 cents in daily rates or \$3.65 in trip earnings is clearly not equitable additional compensation for 2.9 additional hours per trip on duty time. Whatever may be the merits of the present levels of through freight earnings and hours, it is clear that the additional hours required in converted through freight are not equitably compensated relative to through freight. The inequity is compounded by the fact that the same crews are normally involved, and a crew may start out expecting to run as through freight only to have additional work added in three or more stops with materially greater hours on duty. The combination of miles, hours and earnings in converted freight, compared with through freight, constitutes a further deficiency in the present pay rules.

(5) *Earnings Relationships by Class of Service and by Craft.* The relative earnings of different categories of operating employees—by class of service and craft or occupation—will vary, it was observed in the last chapter, with the measure of wages which is selected. No single measure of earnings is entirely satisfactory in appraising the wage relationships among groups of operating employees. Accordingly, table 8 which follows reports the basic daily rate (average graduation), earnings per trip, average earnings per hour on duty

TABLE 8. DAILY RATES, EARNINGS, AND HOURS, BY CRAFT AND CLASS OF SERVICE

Class of service	Basic Daily rate, average graduation, March 1941	Earnings and hours, July-Dec. 31, 1940						
		Average earn- ings per trip	Trip earnings per hour on duty	Total hours per week	Weekly earnings			
					Straight time	Overtime	Con- struc- tive allow- ances	Total
ENGINEERS								
Short turnaround passenger.....	\$30.00	\$32.36	\$4.28	44.8	\$146	\$23.51	\$9.43	\$179
Straightaway passenger.....	21.21	31.77	8.22	25.4	194	.00	6.43	201
Through freight.....	24.97	33.35	6.43	30.3	166	1.05	17.00	183
Converted through freight.....	24.90	37.00	4.55	47.0	150	20.03	12.86	180
Local freight (excluding converted freight).....	23.46	37.51	3.90	50.8	133	44.45	8.24	185
Yard.....	23.55	23.02	3.14	46.8	128	13.06	2.33	143
FIREMEN								
Short turnaround passenger.....	\$18.34	\$27.81	\$4.05	—	—	—	—	—
Straightaway passenger.....	18.85	27.61	7.06	24.2	\$109	\$0.64	\$7.44	\$116
Through freight.....	21.36	28.35	5.55	27.6	132	1.54	12.08	145
Converted through freight.....	21.12	30.81	3.92	41.7	138	6.81	13.76	158
Local freight (excluding converted freight).....	20.16	29.91	3.25	45.9	111	27.30	5.63	144
Yard.....	22.36	23.85	2.88	39.4	101	9.09	1.62	112
CONDUCTORS								
Short turnaround passenger.....	\$21.05	\$29.48	\$4.65	40.3	\$132	\$23.56	\$10.59	\$166
Straightaway passenger.....	21.05	32.16	5.93	32.1	178	.88	3.62	182
Through freight.....	20.82	28.82	5.54	31.6	154	.88	16.50	171
Converted through freight.....	21.38	34.34	4.04	45.8	131	16.71	18.87	167
Local freight (excluding converted freight).....	21.03	32.45	3.30	52.8	123	37.50	8.08	171
Yard:								
(BRT).....	22.50	26.03	3.12	40.7	110	12.00	5.31	128
(SUNA).....	22.74							
BRAKEMEN								
Short turnaround passenger.....	\$18.50	\$27.97	\$4.02	41.5	\$119	\$24.20	\$5.64	\$149
Straightaway passenger.....	18.50	30.81	6.26	31.6	157	1.23	3.33	160
Through freight.....	19.00	25.97	5.16	28.8	121	1.12	17.53	140
Converted through freight.....	19.08	28.57	3.88	35.8	101	12.24	8.24	121
Local freight (excluding converted freight).....	19.08	30.45	3.24	50.4	111	23.47	10.55	146
Yard:								
(BRT).....	22.18	23.75	2.90	37.6	96	8.62	2.79	109
(SUNA).....	21.47							

SOURCE: Pay Structure Study and Tables of Standard Rates.

and weekly earnings (including its major components of straight time, overtime, and constructive allowance pay). These data are presented by class of service and by craft so that various differentials may be considered.

In studying this table it is well to remember that engineers in yard service are on a 6 or 7 day week while the other crafts in yard service are generally on a 5 day week; this is reflected in the figures on average hours worked per week. It is also to be recalled that employees in through freight and passenger service may work a 30-day work month while local freight is presently on a 6 or 7 day workweek.

These average data, and the full distributions which are available in the Pay Structure Study tabulations made by the Commission, show that while there are relatively small differences among classes of service and crafts on basic daily rates there are much larger differences in earnings per trip, per hour on duty, and per week. The impact of differences in hours on duty among classes of service is again clearly evident, including the major role of overtime pay in weekly earnings in local freight and short turnaround passenger service, although the overtime rules are not similar. The significance of constructive allowances in weekly earnings in through freight and converted through freight is also evident from the table.

(a) *Earnings Relationships Among Classes of Service.* There are at least two general ways in which earnings differentials among classes of service may be appraised. The first is to compare the job content of the same occupation in the various classes of service, and the second is to examine the historical movement of these earnings differentials.

We do not believe that it would be fruitful to undertake a formal job evaluation comparison of different classes of service or of different occupations. The railroad operating classifications include only a relatively few occupations in a few classes of service. Formal job evaluation plans have not been found fruitful in such circumstances in other industries with a craft orientation such as airlines, shipping, construction, and the like. Moreover, there is great variability in the actual content of many assignments depending on operating conditions, and the jobs are not standardized to the same degree as in manufacturing industry or in offices where formal job evaluation plans have been used extensively. Nonetheless, it has been possible for the Commission to make some appraisal of job duties both by reference to the record and by the observation trips.

In analysis of job duties it is customary to establish a series of job factors which describe job content including such factors as training, skill, responsibility for equipment, responsibility for personnel, mental and physical effort, safety and hazards, and working con-

ditions. In the more informal comparisons made by the Commission among classes of service and craft duties, the major emphasis has been placed upon responsibility, effort, and working conditions, including safety and the requirement to be away from home. When one appraises job duties for the identical crafts in different classes of service with the aid of these job factors, some major contrasts emerge among classes of service.

In our judgment, in general, responsibility for equipment is greatest in through freight service by virtue of the heavier power, longer trains and higher speeds. The average weight on drivers, length of trains and speed by class of service, as shown in the Pay Structure Study, are as follows:

Class of service	Average speed of assignment, engineers and conductors	Actual train speed	Average weight on drivers (pounds)	Average length of train (cars)
	Miles per hour	Miles per hour	000's	
Straightaway passenger.....	38.5	40.7	535	
Through freight.....	23.2	22.5	604	11
Converted through freight.....	15.2	19.7	767	10
Local freight.....	10.2	13.1	396	
Yard.....			266	

On the other hand, we are impressed by the amount of effort or work that is involved in the frequent switching required of local freight and yard employees, and by the necessity, for train service employees particularly, to work under adverse weather conditions in local freight and yard service. These appear to be substantially greater than they are in through freight and straightaway passenger service. On balance, our judgment is that differences in job content among classes of service are generally ordered in the sequence of trip earnings per hour on duty or straight time weekly earnings among classes of service, but the compensation differentials are materially out of line with relative job duties. Through freight and straightaway passenger service is relatively overvalued and local freight and yard service is relatively undervalued.

A review of the changes in compensation differentials among classes of service over the past forty years leads to a similar conclusion, if any weight is attached to the relative reductions in hours worked among classes of service. Consider, for instance, the following data derived from ICC reports showing the change in various measures of earnings of engineers in various classes of service.

	Earnings of Engineers			
	1929	1940	1950	1960
Passenger service:				
Annual earnings.....	\$3,001	\$3,650	\$5,650	\$11,053
Earnings per trip.....	8.91	-----	20.06	*33.00
Earnings per hour worked.....	1.35	2.08	3.03	7.02
Hours per trip.....	6.6	5.3	6.1	*4.8
Hours per week.....	42.3	33.6	32.6	*30.2
Through freight service:				
Annual earnings.....	\$2,804	\$3,227	\$5,590	\$9,095
Earnings per trip.....	10.91	-----	21.00	*36.28
Earnings per hour worked.....	1.80	1.60	3.02	6.53
Hours per trip.....	9.9	7.3	7.2	*6.0
Hours per week.....	48.8	38.5	35.5	*38.0
Local freight service:				
Annual earnings.....	\$2,495	\$4,095	\$7,334	\$11,288
Earnings per trip.....	11.73	-----	22.14	*36.28
Earnings per hour worked.....	1.00	1.34	2.30	4.08
Hours per trip.....	10.8	9.4	9.7	*9.3
Hours per week.....	61.3	58.6	61.4	*63.8
Yard service:				
Annual earnings.....	\$2,345	\$2,791	\$5,168	\$8,000
Earnings per trip.....	-----	1.07	2.00	3.40
Earnings per hour worked.....	-----	8.1	8.2	*8.3
Hours per tour of duty.....	50.9	40.8	40.7	*48.1

*1960 data.

The relationships among classes of service over the years, when measured in terms of earnings per year or per trip, have not changed dramatically, but if earnings are measured per hour worked, there has been a much greater increase in through freight and passenger service than in local freight and yard service. If reduction in hours is given any significance, then it is apparent that employees in passenger and through freight service have increased their position relative to those in local freight and yard service. The greater the significance that is attached to the relative changes in hours, the greater the distortion in the historical compensation relationships.

(b) *Earnings relationships among occupations.* There are also at least two general ways in which the earnings differentials among occupations may be appraised. The first compares job content of the various occupations within each class of service, and the second examines the historical movement of interoccupational differentials. It is imperative that relationships be explored within each class of service, rather than on the average for all operating employees. The question of interoccupational differentials is a most sensitive matter to the individual organizations in view of the organizational rivalry and overlapping membership.

We have used the job factors referred to above—responsibility, effort, and working conditions including safety and the requirement to be away from home—as a check list to appraise earnings relationships among job classifications by class of service. The appraisal relates to a comparison of job duties of the positions rather than to the men who fill the jobs. The same qualification needs to be noted again as to the wide variety of job conditions and ways in which crews organize their work.

We approach the question of interoccupational earnings differentials with the view that there are two ladders of promotion of operating employees. The engineers and firemen are on one ladder, and the conductors and brakemen are on another. There are for each class of service accordingly three questions of wage relationships involved: the engineer and fireman differential, the conductor and brakeman differential, and the relationship between the tops of the two ladders.

There is little question as to the relative wage positions of engineers and firemen or conductors and brakemen. The top job is without question entitled to the superior rating. In appraising the size of the differential between engineers and firemen in any class of service, we believe that the factors of responsibility and experience are most significant since working conditions are not dissimilar between the two jobs located in any engine cab. Our judgment is that in all classes of service—in some more than others—the present wage differentials are considerably too narrow. The job of engineer relatively is materially undervalued and the job of fireman relatively is materially overvalued.

In appraising the relative wage position of conductors and brakemen in any class of service the Commission believes that the factors of responsibility, experience, and effort are most significant since working conditions of the two groups are closely interrelated. The factors of experience and responsibility tend relatively to favor the job of the conductor while the factor of effort tends to favor the job of the brakeman. Our judgment is that in all classes of service—in some more than others—the present wage differentials are in some degree too narrow. The job of conductor relatively is undervalued and the job of brakeman relatively is overvalued.

In appraising the relative wage positions of the job of engineer and the job of conductor in various classes of service, the job factors of responsibility, effort, and working conditions including safety are likely to be somewhat less directly applicable since the top jobs in the two different promotion ladders are more dissimilar than the jobs within the same promotion ladders. The nature of the responsibility of the conductor and the engineer and the characteristics of their working conditions are more dissimilar than the features of the jobs in a single ladder of promotion. However, these factors are of some value in analyzing relative differentials between the jobs of engineer and conductor in different classes of service. In general, it is our judgment that the differential in earnings in favor of the engineer should be narrower in yard and local freight than in through freight and passenger service.

In through freight service the comparisons of job content are complicated by the wide variations in the combinations of the size of power

and the length of trains. Moreover, the relative pay relationships are materially influenced by the different systems of graduation under which the pay of engineers varies with the weight on drivers brackets and the pay of conductors with the length of train brackets. Thus, trip earnings of engineers on short trains with very heavy power may be 40 percent in excess of those of conductors, while the combination of a very long train with a single locomotive unit may yield an earnings differential as low as 5 percent between the two crafts. The variations in the earnings relationships are more influenced by the two graduated brackets than by the differentials in the basic daily rates. The extremes in the differentials between engineers and conductors in through freight, as a consequence of the two systems of graduation, appear to be excessive.

TABLE 9. OCCUPATIONAL WAGE RELATIONSHIPS, 1922-60

Occupation	PASSENGER SERVICE					
	Average basic daily rates		Average earnings per trip		Average earnings per hour worked	
	1922	1960	1922	1960	1922	1960
Engineer.....	\$8.12	\$30.66	\$8.91	\$33.00	\$1.35	\$7.09
Fireman.....	4.60	18.31	6.09	26.67	1.08	6.45
Conductor.....	6.51	21.07	8.80	32.44	1.13	5.44
Brakeman.....	4.50	18.50	6.12	26.16	.79	5.11
	THROUGH FREIGHT SERVICE					
	Average basic daily rates		Average earnings per trip		Average earnings per hour worked	
	1922	1960	1922	1960	1922	1960
Engineer.....	\$7.27	\$24.10	\$10.91	\$36.28	\$1.10	\$6.29
Fireman.....	5.41	20.61	8.12	30.24	.82	5.25
Conductor.....	8.92	30.80	9.01	31.60	.91	5.48
Brakeman.....	4.61	18.96	6.97	28.55	.71	5.04
	LOCAL FREIGHT SERVICE					
	Average basic daily rates		Average earnings per trip		Average earnings per hour worked	
	1922	1960	1922	1960	1922	1960
Engineer.....	\$7.40	\$23.87	\$11.73	\$36.28	\$1.09	\$6.03
Fireman.....	5.47	20.14	8.62	30.39	.80	5.29
Conductor.....	6.35	21.19	9.80	32.35	.93	5.62
Brakeman.....	4.97	19.40	7.70	29.48	.73	5.29
	YARD SERVICE*					
	Average basic daily rates		Average earnings per trip		Average earnings per hour worked	
	1922	1960	1922	1960	1922	1960
Engineer.....	\$5.62	\$23.24	(1)	\$25.62	\$0.88	\$5.40
Fireman.....	5.10	21.33	(1)	23.85	.86	5.09
Conductor.....	6.34	22.99	(1)	25.03	.84	5.41
Brakeman.....	5.84	21.60	(1)	23.76	.77	5.18

* Information not available.

* Commission data.

Source: ICC M-300 reports and Pay Structure Study.

The above judgments on occupational wage relationships based upon job content are supported by a review of historical wage differentials among occupations over the past 40 years. The above tabulation from ICC data (table 9) shows average basic daily rates, average

earnings per trip, and average earnings per hour worked among the key occupations by class of service. Since there is much less of a difference in the way hours per trip have changed among occupations in the same class of service than the way hours per trip have changed in the same occupation in different classes of service, earnings per trip or per hour worked is a more reliable measure of intercraft wage relationships.

Any appraisal of historical movements of intercraft wage differentials must recognize that most such differentials in industry generally, in one plant or industry and certainly in a single ladder of promotion, have narrowed over long periods when expressed in percentage terms. They have tended, however, to widen when expressed in dollar terms. There is no reason to expect different developments in the railroad wage structure, and there is no absolute reason for preserving occupational wage relationships from one period to the next in percentage or dollar terms. The ordinary pattern is some narrowing in percentage terms with higher money wage levels.

Table 9 shows that earnings per trip or earnings per hour worked in 1922 were about 30 to 35 percent higher for engineers than for firemen. This relationship was about the same for all classes of service. In the intervening period this percentage relationship has been narrowed to the greatest extent in yard service where engineers' earnings per day or per hour worked exceed those of firemen by approximately 10 percent; in through and local freight the figure is approximately 20 percent, and in passenger service it is 10 to 15 percent.

The earnings per trip or earnings per hour for conductors exceeded those for brakemen in 1922 by about 40 percent in passenger and yard service; in through freight and local freight the percentage relationship was about 25 to 30 percent. These percentage relationships have been narrowed most in passenger service where the figure is about 5 to 10 percent; in the other classes of service it is about 10 percent.

The relationships of earnings per trip or per hour worked between engineers and conductors in percentage terms has narrowed relatively little over the period compared to the compression in the other occupational differentials, except in yard service where there is a difference between engineers and conductors in the number of days which comprise the work week.

The job content and historical wage relationships by class of service indicate that, while there are variations among classes of service, the wage relationships between engineers and firemen are materially too narrow, and the wage relationships between conductors and brakemen are to some degree too narrow.

(6) *Graduation Systems.* As was noted in chapter 8, one component of compensation for engine service employees in all classes of

service is determined by the weight on drivers of locomotives. The heavier the locomotives, as measured by weight brackets, the higher the pay. In through freight and local freight service, the compensation of train service employees is related to the length of trains. The longer the trains, as measured by brackets of cars, the higher the pay. These two different systems of graduation and their differential effects on earnings have been a continuing source of friction among operating crafts. Moreover, the differential yields in earnings of these systems of graduation materially complicate the establishment of equitable interoccupational wage differentials. The actual differentials in average earnings depend not so much upon the relative basic daily rates or miles run as upon the combinations of weight on drivers and length of trains that arise in actual experience.

There are wide variations in the combination of locomotive power and length of trains on the railroads for a variety of operating conditions. Many instances arise of long trains with light power, and there are also many instances of heavy power with short trains. The diversity in the combinations of train lengths and weight on drivers is shown in table 10. It also shows the percentage differentials in basic rates between engineers and conductors for each combination of train length brackets and weight on driver brackets. The differential at the current average weight on drivers in through freight (900,000 to 950,000 pounds) and the current average car length bracket (81-105) is 19.9 percent. But for some combinations in actual use, however, the differential is as low as 3.3 percent, while for others it is as high as 44.1 percent.

Such gross disparity in differentials created by two systems of graduation is a major defect in the present compensation system. The engineers properly complain of the low differentials on long trains with light power, and the conductors appropriately complain of the high differentials on short trains with heavy power. The wage structure for operating classifications can never be regarded as equitable until such extreme variations are eliminated. Such disparities can be corrected apart from the question of the appropriate average differential between engine and train crews.

The present systems of graduation not only materially complicate the earnings differentials between engine and train service employees, but they also involve inequities as among differently situated engine service employees and also as among different groups of train service employees. Thus, consider two different engineers, each with locomotives of 950,000 pounds weight on drivers, the one with 10 cars and the other with 200 cars. Weight on drivers alone is not an adequate measure of the job content of the two engineers. The task of handling a 900-car train with 4 units has a higher job content than handling 10

TABLE 10. THROUGH FREIGHT ENGINEERS AND CONDUCTORS: PERCENTAGE DIFFERENTIAL IN BASIC RATES FOR COMBINATION OF WEIGHT ON DRIVERS AND NUMBER OF CARS

Number of cars and basic daily rate— Conductors	Percentage differential in basic rates for indicated combinations of weight on drivers and number of cars									
	Weight on drivers (thousands of pounds) and basic daily rate—Engineers									
	(200-240) to (300-360)	(300-360) to (500-540)	(500-540) to (700-740)	(700-740) to (900-940)	(900-940) to (1,100-1,140)	(1,100-1,140) to (1,300-1,340)	(1,300-1,340) to (1,500-1,540)	(1,500-1,540) to (1,700-1,740)	(1,700-1,740) to (1,900-1,940)	(1,900-1,940) to (2,100-2,140)
Less than \$1 car—\$20.47..	9.4-10.9% (17)	11.9-15% (137)	16.9-18.5% (186)	19.3-22% (104)	22.9-24.5% (132)	26.4-29% (123)	29.9-32.3% (76)	33.4-36.1% (9)	36.9-39.6% (2)	(2,100-2,140) to \$20.47
\$1-105 car—\$20.52.....	7.5-9% (3)	10-13% (40)	13.9-15.5% (123)	17.3-19.9% (126)	20.8-23.4% (169)	24.3-26.9% (92)	27.7-30.3% (78)	31.2-33.9% (2)	34.6-37.2% (0)	41.9-44.1% (1)
106-125 car—\$21.22.....		7.9-10.9% (30)	11.7-14.3% (78)	15.1-17.7% (71)	18.5-21.1% (75)	21.9-24.5% (67)	25.3-27.9% (26)	28.7-31.2% (1)	32.1-34.6% (1)	37.3-39.9% (1)
126-145 car—\$21.47.....	4.3-5.7% (1)	6.7-9.6% (22)	10.4-13% (48)	13.8-16.3% (33)	17.1-19.7% (37)	20.5-23% (28)	23.9-26.4% (16)	27.3-29.7% (1)		31.7-34.2% (1)
146-165 car—\$21.57.....		6.2-9.1% (11)	9.9-12.4% (14)	13.3-15.8% (6)	16.6-19.1% (17)	19.9-22.4% (8)	23.2-25.8% (6)			36.9-39.1% (1)
166-185 car—\$21.77.....			8.9-11.4% (12)	12.2-14.7% (3)	15.5-18% (19)	18.9-21.3% (6)	22.1-24.6% (7)		25.5-28.1% (1)	
186-205 car—\$21.97.....		4.2-7.1% (4)	7.9-10.4% (13)	11.2-13.7% (1)	14.5-16.9% (7)	17.9-20.2% (3)		21.2-23.6% (1)		
206-225 car—\$22.17.....		3.3-6.1% (1)	7-9.4% (1)					24.5-26.9% (1)		

Number of trips shown in parentheses for each combination.
Percentage differential is shown in each case for the minimum and the maximum of the range of weights on drivers.
Source: Commission Pay Structure Study—Through freight engineers' trips (2,000 total trips).

cars with the same power. Yet their compensation is the same. Or consider two conductors with trains of 60 cars, one moving at a very slow pace since only a single unit is used, and the other moving at 50 miles an hour under the power of four units. The task of observation, the responsibility, and the working conditions for train crews are different on these two trains of the same length. Yet their compensation is the same.

While the past 20 years have witnessed significant changes in weight on drivers and in train lengths, the developments of the next decade cannot be presumed to follow the same course. There are technological developments likely to reduce the weight on drivers required to pull a given train at a given speed, and competition is likely to require shorter and more specialized trains meeting faster schedules. These future developments may mitigate to a degree the present extremes or at least prevent the disparities from becoming worse.

The present systems of graduation create serious inequities arising from the wide disparities in the differentials in earnings between different groups of engine and train crews as well as inequities within each grade of service.

(7) *An Incentive System.* The parties are in agreement that the mileage basis of pay in road service is a form of an incentive or piece rate system of pay with the number of miles run the measure of output or production. Approximately half the jobs of operating employees—those in yard service—are paid exclusively on a daily basis, and the mileage basis of pay has no relevance to their compensation. In road service, the proportion of runs which in fact are compensated on the mileage component varies considerably by class of service. The following tabulation, based on data applicable to engineers, estimates the proportions of runs in each class of road service in which wages are determined solely by the mileage basis of pay, the proportion determined by both the mileage and overtime components and the proportion influenced by the daily rate, including daily overtime, alone.

Class of service	Proportion of Runs		
	Mileage	Mileage plus Overtime	Daily
Straightaway passenger.....	85.7	4.3	10.0
Turnaround passenger.....	13.6	56.7	29.7
Through freight.....	74.5	1.5	24.0
Converted through freight.....	65.5	11.9	22.6
Local freight.....	31.9	17.1	51.0
Yard.....	0	0	100.0

These figures, when weighted by relative employment, suggest that in approximately 60 percent of all road service runs the mileage component of compensation alone determines compensation, and in

another 8.3 percent of all road service runs the mileage plus overtime components determine compensation. The pure mileage system accordingly governs the compensation of less than 40 percent of all operating employees. The very existence of this sort of division in the method of pay, particularly when employees move between classes of services and runs, is a disruptive factor making most difficult the maintenance of equitable wage relationships.

There is considerable difference of opinion within the railroad industry concerning the extent to which the mileage basis of pay continues to provide an incentive, to whom it provides an incentive, and for what purposes it is an incentive. At the turn of the century, the mileage basis of pay no doubt provided an incentive to get the trains over the road. The crews were able to go off duty when they got to their destinations, and they would be eligible to leave sooner for the next trip under pooled service, making more miles and money. This system of pay also provided, in part, a substitute for supervision since train crews often operated at remote distances and out of direct communication from management. In recent years, technological change has materially affected these reasons for the mileage basis of pay. The growth of automatic block signals, Centralized Traffic Control, and modern communication devices, with a reduction in the extent of operations by timetable and train orders alone, clearly diminishes the extent to which the progress of the train is subject to the control of the train crew alone.

Under incentive systems in industry generally, piece rates or incentive rates are revised from time to time with major technological changes which alter the work tasks. Most collective bargaining agreements with piecework or incentive rates explicitly provide that the rates shall be changed under such circumstances. But the standard basic day of 100 miles in freight and passenger engine service and 150 miles in passenger train service have remained unchanged since the orders of the Director General of Railroads in World War I or even earlier. No piecework or incentive system can be kept viable and free from distortions in earnings in a world of changing technology without periodic review and revision.

Any piecework or incentive system of compensation may be expected to yield considerable diversity in earnings. But the wide ranges in combinations of hours and miles and pay in each class of service (tables 2-7, chapter 8) appear unusual by the standards of industry generally. Such statistical distributions of miles, hours on duty, and pay have never been available for the railroad industry as a whole previously. A mile may be a poor measure of output under conditions of varying power, number of stops, grades, traffic, signal and communications systems, and operating conditions. Some

ough freight trips, for example, average a mile in 1.2 minutes, while other trips take 12 minutes to average a mile. In these circumstances a mile may not be an entirely suitable measure of output to be applied to all trips. A mile is not always the same mile of work. Finally, the mileage basis of pay has used 100 miles in freight and passenger engine service as a measure of a "day's" work (150 miles in passenger train service.) When the survey of the Commission shows that there are through freight runs and converted freight runs over 255 miles in length and straightaway passenger runs over 260 miles in length, it is of dubious validity to continue to associate 100 miles with a day. The average through freight trip is approximately 100 miles. Some number of miles may appropriately be regarded as a unit of work, but to continue to identify 100 miles with a calendar day is only one indication of the extent to which the dual basis of pay has been unresponsive to evolving conditions over the years.

The dual basis of pay, including the mileage component, is deeply embedded in the railroad industry and in the managements, the workers, and in their labor organizations. The present employees and managements have never known any other basis of pay for many operating employees. Moreover, under present operating conditions the mileage component of pay still provides an element of incentive under some conditions. In these circumstances we have sought to improve and to perfect a method of pay which combines a mileage and an hourly component of compensation.

(8) *Administration of the Pay Rules.* Every compensation system should be appraised by the standard of simplicity of administration. This test involves the question whether the pay rules can be readily understood by those to whom they apply. But the test also includes the cost of administration of the compensation system and the tendency to encourage disputes and grievances. Any reviewer of the compensation system applicable to operating employees, with the large number of components of compensation and the variety of pay rules, must conclude that the system is highly complex and that it stimulates disputes.

* * * * *

In summary, this appraisal of the compensation structure of operating employees has analyzed hours on duty, overtime rates, wage relationships under the dual system of pay, the converted through freight rate, earnings relationships by class of service and occupation, the mileage basis of pay as an incentive system, and the complexity of administration of the pay rules.

The conclusion is that the present disparity in hours on duty—some unduly short and others excessively long—is unconscionable; the speed of overtime is an anachronism involving inconsistencies among

types of runs; the dual basis of pay contains widespread anomalies and inequities; the wage differentials among classes of service and occupations within each class of service contain serious inequities; the mileage basis of pay has limitations as an incentive system of pay; it has produced differential earnings and hours on duty among groups of employees which in turn have created further wage and hour disputes: the pay rules are complex, and with many components to compensation, they contribute to disputes. In short, the word which best describes the compensation structure is a mess.

These inadequacies in the compensation rules have persisted for so long because the seniority system has made them tolerable in the sense that senior employees have the pick of assignments, except in pool service where seniority is used to gain access to the job pool. These deficiencies have also continued by virtue of the fact that bargaining has been by separate crafts, and there has been no mechanism for comprehensive review. Moreover, the data adequately to appraise the wage structure had not previously been compiled. Except for these factors the wage structure would have long since compelled insistent attention. The Carriers and the Organizations confront a major joint assignment in seeking to remove these major deficiencies and to improve and modernize the wage structure of operating employees.

The Approach to the Dual Basis of Pay

The recommendations to follow will be more readily understood if a brief section is devoted to explaining the general outlines of the proposed revisions in the dual basis of pay as they would apply to freight service. These revisions are designed primarily to eliminate or to moderate the anomalies and inequities discussed earlier in this chapter and to improve the present system of pay.

The recommendations divide the present local freight service into two parts. First, runs up to 100 or 110 miles—more than half the total local freight runs—would constitute the new local freight service. They would be paid exclusively on an hourly or daily basis as at present in yard service. Second, the longer local freight runs, some over 200 miles in length, would be combined with through freight and converted freight under a single system of pay which would be the revised dual basis of pay.

The revised dual basis of pay would be comprised of a mileage component *plus* an hourly component subject to certain minima. The present basis of pay is miles *or* hours. The proposed basis of pay is miles *plus* hours.

In the present basis of pay the daily rate divided by 100 miles determines the mileage rate. In the proposed basis of pay the daily or

hourly rate and the mileage rate would be independent of each other and could be separately bargained. The influence of the mileage component on compensation could be constricted by applying future general wage increases to the hourly component, or the role of the mileage factor could be enhanced by raising the mileage rate.

In designing the revised dual basis of pay, the level of the existing basic daily rates was taken as an initial point of departure. These rates divided by 8 hours yield an existing hourly rate. Since mileage pay is to be *added* to hourly pay under the proposed dual basis of pay, the present mileage rates could not be used. To add together the present hourly and the present mileage components would very materially increase the level of compensation. This result would be expected since the existing system is miles *or* hours, not miles *plus* hours. The proposed dual basis of pay utilizes the present level of hourly rates, adjusted for relationships among classes of service and occupations, plus one half the present mileage rate. This arrangement has the effect of increasing the relative role of hours and downgrading the relative influence of miles in the compensation system. But it is designed to preserve and to improve a dual basis of pay.

The proposed basis of pay also makes it possible to achieve the principle that compensation increases both as hours on duty increase or as miles increase beyond the standard task.

The proposed dual basis of pay would eliminate the speed basis of overtime and provide that time and a half the hourly component of pay be paid for hours in excess of the standard day.

The proposed dual basis of pay introduces a new concept designated the overmile rate. A premium mileage rate equal to $1\frac{1}{2}$ times the proposed mileage rate is applied to parallel the overtime rate. The point of 160 miles has been selected to begin the overmile rate because this distance corresponds approximately to that run in 8 hours by through freight trains with an average speed of assignment of 20 miles per hour. An overmileage rate provides an incentive to the employees to accept longer runs, but the overtime rates provide a measure of protection against excessively long runs.

The proposed dual basis of pay preserves the notion of a daily minimum.

The proposed dual basis of pay in freight service may be summarized in three statements:

(a) An hourly component of compensation (one-eighth the daily rate) is paid for the number of hours on duty from time required to report. An overtime component is operative at time and one-half the hourly rate for hours over 8.

(b) A mileage component of compensation, to be added to the hourly component, is calculated by multiplying the mileage rate

by the number of miles run in excess of the standard task of 100. An overmiles component is operative at one and one-half times the mileage rate for miles in excess of 160.

(c) The sum of the hourly and mileage components is to be no less than the basic daily rate which constitutes a daily guarantee.

A diagram, analogous to that in chapter 8, may help to explain the proposed dual basis of pay.

Hours

16	Basic Day + 1½ Hourly Rate	1½ Hourly Rate + Mileage Rate	1½ Hourly Rate + Overmileage Rate
8	Basic Day	Mileage Rate + Hourly Rate	Overmileage Rate + Hourly Rate
	0	100	160

An example may help to explain the main features of the proposed basis of pay. A freight engineer, at the average weight on drivers in through freight (900,000-950,000 pounds), would under the proposed consolidated freight schedule be paid at the daily rate of \$25.53 or an hourly rate of \$3.1925 and an overtime rate of \$4.787. This rate schedule is the present local freight schedule, which is 56 cents a day higher than the present through freight rate for engineers. The proposed mileage rate is 12.485 cents and the proposed overmileage rate is 18.7275 cents a mile. A run of 180 miles in 10 hours would yield the following compensation:

Hours:

Basic pay (8 hrs. × \$3.1925)	\$25.53
Overtime (2 × \$4.787)	9.57

Miles:

Mileage rate (60 × 0.12485)	7.49
Overmileage rate (20 × 0.187275)	3.75

Total 46.34

An increase in the number of hours required to make the same run, such as might be required to make an additional stop to set out or pick up cars, would increase compensation by the hourly (overtime) factor. Thus an increase of one hour would raise pay by \$4.787. An increase

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in miles, apart from any change in hours, would also increase compensation by the mileage (overmileage) factor.

Any run of 100 miles or less in 8 hours or less would be paid at the same basic pay of \$25.53 assuming the same weight on drivers.

A run of 120 miles in 6 hours would be computed as follows:

Basic pay (6 hours)-----	\$19. 16
Mileage rate (20×0.12485)-----	2. 50
Total -----	21. 66
Daily guarantee applies-----	25. 53

A run of 160 miles in 7 hours would be computed as follows:

Hours (7 hours \times \$3.1925)-----	\$22. 35
Miles (60×0.12485)-----	7. 49
Total -----	29. 84

The design of the proposed dual basis of pay has been to provide that greater miles and hours receive higher compensation than shorter runs and hours. Where runs are short and hours worked are few, the concept of a guaranteed basic day is inconsistent with this principle. The principle of the guaranteed basic day, however, must prevail. In addition, the proposed increase in the minimum and maximum mileage limitations is designed to ameliorate the extent of cuts in compensation in through freight runs from present levels.

Our view is that the present compensation structure applicable to operating jobs and employees can be substantially improved to the benefit of the employees, the carriers and the public. The task cannot be done overnight, nor even in the bargaining sessions over the next agreements between the Carriers and the Organizations. But the parties can immediately take a number of significant steps, including some to be applicable at once and others to take effect at specified dates in the future. They can agree upon the general directions of future changes in the compensation structure, and they can establish joint machinery to take further steps over the years towards the revised compensation structure proposed in this report.

Since the pay rules are highly interdependent, the recommendations regarding the wage structure have to be presented as a whole. The full effects of proposed changes in the pay rules on compensation will depend not merely on their direct effects but also upon physical and operating changes in the railroad system, upon changes in other rules considered in other chapters of this report, as well as on associated changes in technology and business developments.

The recommendations are designed to accomplish the following:

- Reduce materially the wide disparities in hours on duty.
- Eliminate the speed basis of overtime and establish new overtime rules in road service.
- Provide that commuter passenger service compensation rules be negotiated locally so that they may be more responsive to the diverse needs of each metropolitan area as it seeks to stimulate commuter service.
- Revise the dual basis of pay to eliminate anomalies and inequities and to provide for compensation based upon miles plus hours.
- Develop a wage structure which eliminates the inequities in earnings between classes of service and among occupations within each class of service.
- Simplify the compensation system.
- Provide for a continuing joint committee, with technical staff, to continue to review the wage structure of operating employees.

RECOMMENDATIONS

It is recommended that the parties negotiate appropriate rules which will incorporate the following principles, using the rates cited as general guidelines:

1. Hours on continuous duty. *It is recommended that the present limitation of 16 hours of time on continuous duty, established by Federal law, be reduced gradually by collective bargaining. The reduction should be 1 hour on July 1, 1962, and 1 additional hour on July 1, 1963. The rules which are currently applicable regarding relief of crews and rest after 16 hours shall apply at the reduced hours. We urge the parties to continue to study the possibilities of lowering further the daily limit gradually over a period of years to a maximum of 12 hours a day.*

2. Hours limitation. *It is recommended that there be established, effective July 1, 1962, a weekly or a monthly hours limitation in the form which would provide that an employee who had completed a specified number of hours on duty each week or month, 52 hours a week or 208 hours a month, would not be permitted to start an assignment leaving his home terminal.*

3. Short turnaround passenger service. *It is recommended that the mileage basis of pay be eliminated from commuter or*

short turnaround passenger service and that the service be placed entirely on a daily basis of pay. It is further recommended that the pay scales and other pay rules applicable to commuter service be withdrawn from national handling and be negotiated locally, separately and apart from the negotiation of other matters in this proceeding. This recommendation is made in view of the wide disparity of operating conditions and the special problems involved in stimulating commuter service in each metropolitan area.

4. **Speed basis of overtime.** It is recommended that the speed basis of overtime be eliminated in all classes of road service where it now applies and in its place rules be written to provide for overtime in freight service at time and a half the hourly rate for all hours on duty in excess of 8 hours and for overtime in passenger service, except short turnaround, at the straight-time hourly rate.

5. **Daily basis of pay in local freight.** It is recommended that the mileage basis of pay be eliminated on local freight runs up to 100 or 110 miles and that a new schedule of daily basic rates be applied to the new class of local freight as set forth in paragraph 9 of these recommendations. It is recommended that the parties develop more detailed standards to define precisely the runs in the new class of local freight service to be paid on a daily basis.

6. **Freight service.** It is recommended that the longer local freight runs, excluded under 5 above, converted freight and through freight service be combined under a single system of pay. The same schedule of rates, varying only with graduation schedules in engine and train service, shall apply to all runs in the proposed new definition of freight service. It is recommended that such freight service be compensated on a revised dual basis of pay.

7. **Dual basis of pay in freight service.** It is recommended that the dual basis of pay as applied in freight service be modified in accordance with the principles outlined earlier in this chapter. The proposed dual basis of pay in freight service provides:

(a) An hourly component of compensation ($\frac{1}{2}$ the daily rate) shall be paid for the number of hours on duty from the time required to report. An overtime component shall be added at time and a half for hours over 8.

(b) A mileage component of compensation, to be added, based on a mileage rate multiplied by the number of miles in excess of the standard task of 100. An overmiles component

shall be added at $1\frac{1}{2}$ times the mileage rate for miles in excess of 160.

(c) The sum of the hourly and mileage components shall not be less than the applicable daily guarantee.

(d) The minimum and maximum mileage limitations under existing rules shall be increased by 15 percent. The present average weekly hours in through freight service approximate 30 hours a week. The recommendation in this sub-paragraph will increase weekly hours by a modest amount and will cushion the impact on the earnings of those adversely affected.

8. Dual basis of pay in straightaway passenger service. It is recommended that the revised dual basis of pay in straightaway passenger service operate as follows:

(a) An hourly component of compensation ($\frac{1}{3}$ the daily engine rate in engine service and $\frac{2}{15}$ the daily rate in train service) shall be paid for the number of hours on duty from the time required to report. For purposes of determining this hourly component, 56 cents shall be added to the present daily rate of engineers, 40 cents to the rate of firemen, 56 cents to the rate of conductors, and 43 cents to the rate of brakemen. These additions are necessary to preserve the differentials in basic daily rates between straightaway passenger service and freight service, as recommended. The overtime rate shall be the same as the hourly component.

(b) A mileage component of compensation, to be added, based on a mileage rate multiplied by the number of miles run in excess of 100 miles in engine service and in excess of 160 miles in train service. An overmiles component shall be added at $1\frac{1}{2}$ times the mileage rate for miles in excess of 100 in engine service and in excess of 220 in train service.

(c) The daily minimum shall be the daily rate.

(d) On all runs the hourly component shall provide for at least 5 hours' pay in engine service and $7\frac{1}{2}$ hours' pay in train service.

9. Schedule of daily and mileage rates. The following schedule of daily and mileage rates (Eastern Territory) is recommended. In classes of service on a daily basis—yard and local freight and miscellaneous services on a daily basis—the proposed rates are exclusive of holiday pay. The holidays with pay recommended in chapter 10 are in addition to the rates here recommended.

Occupation	FREIGHT SERVICE*		
	Weight on drivers or car bracket	Hourly rate	Mileage rate (cents per mile)
Engineer.....	900,000-950,000	\$3.1925	12.485
Fireman.....	900,000-950,000	2.72	10.68
Conductor.....	106-125	2.82	10.61
Brakeman.....	106-125	2.47875	9.7
LOCAL FREIGHT SERVICE (DAILY BASIS)			
Engineer.....	350,000-400,000	\$3.20	
Fireman.....	350,000-400,000	2.65	
Conductor.....	81-105	2.90	
Brakeman.....	81-105	2.60	
YARD SERVICE			
Engineer (5 day).....	250,000-300,000	\$3.20	
Fireman.....	250,000-300,000	2.795	
Conductor.....		3.10	
Brakeman.....		2.90	
STRAIGHTAWAY PASSENGER SERVICE			
Engineer.....	550,000-600,000	\$4.354	11.6
Firemen.....	550,000-600,000	3.834	10.4
Conductor.....		2.881	7.7
Brakeman.....		2.524	6.7

* The weight on drivers and car brackets shown are for the present averages in through freight alone. The new freight service, since it would include converted freight and long local freight, would have average weight on drivers and car brackets lower than the present average for through freight. The proposed rates shown are geared to the present through freight average graduations, and would have to be adjusted to the new averages under the system of graduation adopted for the new freight service.

We recommend that the parties classify the various miscellaneous services into the appropriate freight service or local freight rate classifications. We recommend further that the parties make adjustments of the rates for job classifications not listed proportionate to the adjustments recommended for job classifications to which they have been customarily related.

10. Graduation systems. It is recommended that the parties review the present systems of graduation in the light of the discussion earlier in this chapter, and that they revise the present systems of graduation to provide a single system of graduation for both engine and train service employees under which both weight on driver brackets or number of units and car length

brackets will influence the compensation of both engine and train service crews in freight service. Compensation for both kinds of crews should increase both as weight on drivers and number of cars increase. The unified system of graduation should provide for graduation on the principle of weight on drivers or units plus car length brackets. The revised system of graduation should yield wider percentage differentials than at present for the combination of long trains and light power and narrower percentage differentials for the combination of heavy power and short trains. The revision proposed should not in and of itself affect the average cost or average earnings under the graduation systems.

In addition, the parties shall eliminate the graduation systems in local freight, as redefined by these recommendations, and in yard service. They shall (a) incorporate the average yield of the weight on drivers component, by occupation, into the respective wage rates set forth in paragraph 9 above, adjusted for the appropriate weight on driver brackets in local freight service, as redefined by these recommendations, and in yard service, and (b) incorporate the average yield of the car length brackets component, by occupation, to the train service rates for local freight, as redefined by these recommendations, set forth in paragraph 9 above adjusted for the appropriate car length brackets.

11. Arbitrariness and special allowances. It is recommended that the following duplicate time payments in road service be eliminated: initial terminal switching, final terminal switching, and intermediate yard switching. Initial and final terminal delay rules and other duplicate time payments should be eliminated in local freight service for which we recommend a daily basis of pay. The parties should review the continued application of initial and final terminal delay rules and other duplicate time payments in freight service.

12. Mileage limitations. It is recommended that mileage limitations be reviewed by the parties in the light of the recommendation on hours limitation and in the light of the proposed revisions in the methods of pay. The parties may conclude that hours limitations are more appropriate than mileage limitations, at least in some classes of service.

13. Workweek, workmonth, and workday. It is recommended that the engineers and other crafts on particular railroads in yard service, not on a 5-day week, give consideration to electing the 5-day week. The engineers are now the only craft not generally on a 5-day week in yard service. Higher yard rates, which we

recommend for the 5-day week—but which we do not recommend for the 6- or 7-day week—should provide an added incentive to elect the 5-day alternative.

We recommend that the parties adopt the following priorities in regard to proposals relating to changes in the workweek, work-month, and workday. It has been recommended that effective July 1, 1962, there be a reduction in the maximum hours on continuous duty and an hours limitation on a weekly or monthly basis. It is further recommended that the parties give consideration to a gradual reduction in the workweek from 6 or 7 days to 5 days in local freight and to a gradual reduction in the work-month from 30 days to 26 days in other classes of road service. Such adjustments can be made gradually over a period of time. These changes should be associated with some adjustment—although not a proportionate adjustment—in the basic daily rates. Employees on the longer trips already often work 26 days a month or less. Accordingly such adjustments recommended in principle here, but without specific date, should be considered in conjunction with future general wage movements affecting operating employees.

We believe that reductions in the scheduled workday, particularly where actual hours are below the standard workday, more appropriately ought to be deferred until the workweek and work-month conform more to standard limits in the economy generally.

14. Guarantees. It is recommended that the parties review all guarantees in various classes of service for all crafts in the light of the proposed changes in wage structure and other pay rules and seek to develop a more consistent system of guarantees among classes of service and occupations.

It is recommended that for employees in regularly assigned yard, local freight, and miscellaneous services on a daily basis of pay a weekly guarantee of 5 days be developed for employees who do not lay off of their own accord.

15. Effective date. Since the recommendations relating to compensation are highly interdependent, it is recommended that the proposals in paragraphs 4-12 and 14 be made effective on the same date, July 1, 1962.

16. Procedures. It is recommended that all five Organizations and the Carriers formally agree to establish a standing joint committee comprised of top representatives, with a technical subcommittee and staff, to continue to review the wage structure of operating employees, to initiate with the assistance of governmental agencies periodic wage surveys similar to the Commission's

Pay Structure Study, and to coordinate continuing negotiations over compensation and wage structure issues affecting operating classifications.

The Cost and Earnings Impact of the Recommendations

The effects of the proposed revisions in wage structure upon earnings and upon costs are not simple to estimate. A distinction needs to be made at the outset between (1) the initial effects of the proposed recommendations on earnings and costs, assuming that runs and operations are distributed as they are at present, and (2) the effects which emerge after time has been allowed for reorganization by management of miles and hours of road trips and other assignments. The first is subject to relatively close estimation; the second is perhaps more important but subject to conjecture.

The recommendations were designed to increase the relative compensation of yard, local freight, and miscellaneous services and to decrease the relative compensation of through freight and passenger service.

Our recommendations would yield increases in earnings to about 75 percent of the operating employees. Substantially all yard and local freight employees would receive higher rates. Similarly, road service employees on runs under 100 miles (150 in passenger train service) and those who work long hours in all classes of service will benefit from the higher pay rates and overtime provisions in the recommendations. Approximately 25 percent of operating employees whose trips are in excess of 100 miles but require less than 8 hours on duty will have their earnings reduced. The impact of these rate reductions on earnings, for employees who are now averaging 24 to 32 hours on duty per week, will be substantially minimized under the recommended pay structure as a result of a moderately longer workweek. The workweek of these employees would still be on the average well below 40 hours a week.

It is estimated that the net effect of the proposals in their immediate impact on earnings is an increase of approximately 2 percent in freight and yard service. This amount is in keeping with the drift in earnings that accompanies almost all revisions in pay structures. This is a structural wage adjustment and is not a general wage increase and it should not be so regarded in other wage comparisons. The ultimate effects upon earnings and costs will depend upon future rearrangements of runs and hours.

The parties may wish to negotiate more extensive revisions in wage structure than are herein recommended. Such negotiations could open up new possibilities and alternatives in the review of the pay rules

including more immediate attention to the workweek and the work-month. Such revisions, however, would clearly require the allocation of a greater sum of money than is generally used in structural wage readjustments.

One problem created by the above proposals for a revised basis of pay is the reduction in earnings per trip for employees in through freight service. On this question the report of Emergency Board 109 stated:

Industries which have revised their wage structures have invariably adopted a "red circle" or "incumbent" rule, under which no present employee by virtue of the wage rate revision suffers a loss in wage rate without adequate compensation. There may be some technical problems in applying literally this principle to the railroads in view of the operation of the seniority system under which employees may work in several different classifications from day to day, and in view of the variations in pay rules which create variations in earnings. The practical application of this principle is needed to assure the full cooperation of the individual employee in the wage structure revision program.

A great deal of time has been devoted to trying to find a suitable means of applying the "red circle" principle to railroad operating employees. While none has been found, a number of considerations suggest that the problem is quite different in the railroad industry than in industry generally. The senior employees may use their seniority to select other runs or other classes of service which have been made more attractive by virtue of our recommendations. A number of senior employees may be expected to retire, leaving opportunities for promotions to preferred runs and assignments. On long runs the earnings of an individual are more equitably related to the hours on duty under our recommendations than is now the case. The length of runs may be extended in a number of situations by agreement of the parties or under procedures provided in these recommendations. Increases in the minimum mileage limitations will permit the maintenance of weekly earnings in many cases.

In appraising the earnings and cost impacts of the recommendations, attention has been paid not alone to the effects upon different groups of employees but also to the consequences for different carriers. Not all carriers are similarly situated. They differ in the length of runs, size of power, average speed of trains, and in the proportion of their business among various classes of service. The same change in a pay rule may have quite different cost consequences for different railroads. It is clear that around any average effect of a change in a pay rule, there will be considerable dispersion in the effects on particular railroads. But the extreme consequences on some railroads cannot be determinative for the whole industry.

Concluding Statement

The review and revision of the pay rules for operating employees in the railroad industry is a large task which cannot be accomplished in a brief period. The work of the Commission will have been fruitful if it has helped to furnish the parties with comprehensive data for the first time on the wage structure and if it has provided a detached critique of the present compensation system. The wage data and this critical appraisal, apart from any recommendations, should alone stimulate the parties in concert to review the fundamentals of the pay rules which have not been examined previously in this generation.

Starting from the present wage structure, a perfect, or even a relatively satisfactory wage structure is not likely to be achieved in a single negotiation. This report does not deal with all of the serious problems in the wage structures. The separate systems of graduation in train and engine service produce many strange and disparate results; it is imperative that these disparities be eliminated. The parties may wish to consider the elimination of both systems of graduation, the use of a single system of graduation, or the reduction of the extreme disparities created by the present systems. The higher-than-standard rates and the constructive allowances which are retained should be reviewed and standardized or eliminated by incorporation into the rates. The differentials by classes of service and by occupations deserve further study and change.

There has not been enough consensus, time, and perhaps data to deal fully with all these matters, and the magnitude of adjustments in the wage structure required in this industry exceed the normal cost allowances for such structural adjustments in other industries. We are of the view that the parties should continue to work diligently on these and other problems through the standing joint committee that has been recommended.

No wage structure with as many deficiencies as that for operating employees was ever perfected in a day. But it is imperative that the parties now make a serious start. The recommendations of this chapter have been designed as general guideposts for such a beginning.

CHAPTER 10

Fringe Benefits

The Organizations have made several proposals dealing with parts of the wage structure commonly known as "fringe benefits." These include (1) holidays with pay, (2) night work differentials, and (3) away-from-home terminal expenses, primarily for employees in road service. Frequently, proposals for fringe benefits have been made in the railroad industry, as well as in other industries, as a part of general wage movements. Sometimes certain groups of employees, or those represented by certain labor organizations, have elected to take one of the fringe benefits in lieu of some part of a general wage increase. Indeed, this has happened in the case of paid holidays for some groups of yard employees.

It might be argued, therefore, that it is inappropriate in this proceeding to consider proposals for increases in fringe benefits when requests for general wage increases are not before this Commission. However, the Carriers do not argue that these fringe benefit proposals are not properly before us. Their rebuttal is largely in terms of the lack of merit in the proposals themselves. Furthermore, it may be argued, as the Organizations do, that these proposals are a valid part of their general proposal to "modernize" the wage structure in the railroad industry.

Our conclusion is that these proposals should properly be considered on their merits as a part of the Organizations' pay structure proposals which are before this Commission. The discussion which follows presents an analysis of and recommendations concerning paid holidays, night work differentials, and away-from-home terminal expenses, in that order.

I. Holidays With Pay

The Proposal

The Organizations propose that all employees be allowed holiday pay equivalent to 1 basic day (at the rate for the class of service in which last engaged) for each of 9 specified holidays. The proposal further provides that any employee who is assigned, called, or used

on any of the holidays specified should be paid the holiday rate of 1 basic day and, in addition, at the rate of time and one-half for all service performed on the holiday with a minimum of one and one-half times the rate for the basic day. The proposal further provides that employees (certain classes of yard operating employees) who have previously allocated part of their wage increases to be paid as though for holidays would have the amount thus allocated restored to their basic rates.

Discussion

Road operating employees have never received holidays with pay or premium pay for time worked on holidays, although on a number of occasions in the past requests for holiday pay provisions have been made by one or more of the various organizations representing these employees. In each instance the demand was ultimately withdrawn by the organization, or rejected by the tribunal which considered the matter. This record goes back to 1910, and includes the period of Federal operation of the railroads and the period subsequent thereto, most recently to 1956.

The same situation prevailed for yard operating employees until 1957. In that year Presidential Emergency Board No. 116 considered a paid holiday proposal (among others), applicable to both road and yard employees, advanced by the Brotherhood of Railroad Trainmen. In its report the Board reviewed the positions of the parties and concluded that on the basis of the evidence presented it could not "with any real confidence" approve or recommend paid holidays "as a separate and independent present right of the workers here represented". However, the question of a general wage increase was before the Board, and the Board, in connection with the recommendation that the established pattern of a 26½-cent increase per hour be granted over a 3-year period, recommended a formula under which yardmen represented by the organization would be given 7 paid holidays (when such holidays coincided with an assigned work day of the individual employee), but in effect would have to "buy" such holiday pay, by taking 2 cents per hour less in general wage increases than was recommended for the second and third years of the 3-year period. The Board stated:

Carriers have estimated that granting paid holidays to yardmen under the organization proposal would result in an added cost of 7.1 cents per hour worked. Under the rule as recommended premium pay would not be required for work on holidays and other features of the rule would substantially decrease the estimated cost. Deducting 2¢ per hour each from the second and third year increases impresses us as an appropriate figure to keep the carriers within the 26½¢ per hour cost impact over the three year period and to leave the individual receiving the paid holidays in a better position insofar as annual

earnings are concerned than if he were to receive a bare 2¢ or 4¢ per hour wage increase.

In the agreement disposing of the dispute the Board's holiday pay recommendation was adopted, and the holiday proposals were withdrawn as to all employees except those in yard service. The rule adopted provided for payment of holiday pay in addition to the basic day's pay when the holiday was worked. Subsequently, agreements were negotiated between the major carriers and the other organizations representing yard service employees which gave such employees a series of options, evidently based on the formula represented by the BRT settlement, of using a portion of the respective general wage increase agreed upon to "buy" holiday pay provisions similar to those contained in the BRT settlement. Very few employees represented by the BLE have elected the holiday option. Relatively larger numbers of employees represented by other organizations representing yard service operating employees have taken the option.

Holidays have been recognized in agreements with the nonoperating railroad crafts for a number of years. Even prior to the period of Federal control, many employees of these crafts had the benefit of rules which provided for premium rates when service was performed on holidays. By 1945 a majority of these employees were being paid time and one-half their regular rates of pay for hours worked on designated holidays. Since 1954 the employees of these crafts have been receiving 7 paid holidays (to the extent that such holidays fall on the regular workday of a regularly assigned hourly and daily rated employee), and premium pay at the rate of time and one-half for hours worked on such holidays in addition to holiday pay. The rule granting holiday pay for holidays not worked originated from the 1954 recommendations of Emergency Board No. 106. The Board stated that it was "strongly influenced by the desirability of making it possible for the employees to maintain their normal take-home pay in weeks during which a holiday occurs." Emergency Board No. 114 in 1955, after referring to an earlier settlement that year between the carriers and the operating crafts as having involved the substitution of a "wage increase in settlement of the health and welfare issue then pending between them", stated that "the cost of the paid holidays granted to the nonoperating employees in August 1954 does not carry this same wage connotation."

One other recent holiday pay development in the railroad industry should be noted. Emergency Board No. 137 issued a report on July 10, 1961, in a dispute involving the carriers and the Railroad Yardmasters of America which involved demands by the organization for a wage increase as well as certain "fringe" benefits, including provision for 9 paid holidays. Emergency Board No. 137 pointed out

that Emergency Board No. 106 made no holiday-pay recommendations concerning monthly-rated employees whose monthly rates were predicated upon 174 hours per month (the number of hours comprehended by the monthly rates of yardmasters), but that "the Non-op Agreement of August 21, 1954, granted such employees an adjustment equal to $2\frac{1}{2}$ hours added pay per month (28 hours added pay per year)." Emergency Board No. 137 concluded that "equity requires that the RYA Yardmasters be given the same consideration." The agreement of September 27, 1961, which resulted, incorporated the general principle of this recommendation.

The Organizations in the present proceeding base their holiday pay proposals for operating craft employees on the claim that the principle of paid holidays has already been recognized by the Carriers in the case of the nonoperating employees, and the assertion that, in outside industry, even including companies having continuous operations, the prevailing practice is to grant paid holidays, and to pay for holidays worked at premium rates. The Organizations believe that the "modernization" of the wage structure of the operating employees requires the extension to them of paid holidays as a benefit separate and apart from their general wage levels.

The Carriers oppose the Organizations' proposals on several grounds. First, they contend that the peculiar nature of railroad operations necessitates the performance of work on holidays by operating employees, so that to provide a premium payment for holidays worked would simply involve "penalty" payments for conditions over which the Carriers have no control. Second, they assert that the basic wage structure applicable to operating employees adequately compensates them for holiday work. They contend further that the holiday pay proposals are "irreconcilable with pay rules applicable to operating employees", including the "dual basis of pay" which, they say, operates to give road operating employees a great deal of time off from work, as well as enhanced earnings opportunities which would be compounded with the addition of penalty payments for holidays necessarily worked. The Carriers contend further that payment for holidays not worked is not required in order to maintain the take-home pay of operating employees; that prevailing rules with respect to nonoperating employees do not support the Organizations' proposals; and that the proposals cannot be supported on the basis of practices followed in other industries because of "the substantial differences between the railroad industry and other industries, with respect to holiday operations and other working conditions".

It is clear from the evidence and from studies conducted for the Commission that a substantial majority of organized workers outside the railroad industry, including those involved in continuous opera-

tions (such as steel, oil refining, and chemicals), work under contracts which include holiday pay provisions. It is equally clear, however, that there is no uniformity of practice in this regard in the various segments of the transportation industry. Holiday pay provisions are common in the urban transit, maritime, and local cartage industries. On the other hand, they are not common in the interurban bus, over-the-road motor freight, or airlines industries. If the Organizations' proposals were to be judged solely on the basis of these comparisons, the proper conclusion to be drawn would be debatable. Obviously, however, when account is taken of practices in the transit industry, the case would be stronger for those categories of operating employees who are engaged in essentially local as distinguished from other operations.

There is no doubt that a "modern" wage structure includes holiday pay provisions. Moreover, their justification no longer depends solely or necessarily on the theory of maintenance of pay, since many employees in continuous operations regularly work on holidays, and, for them, the payment of premium rates for time worked on holidays constitutes an emolument in recognition of the fact that they must work whereas their fellow employees have the benefit of a free day with pay. Thus, the fact that many if not most operating employees would have to continue to work on holidays is not, of itself, a compelling reason for rejecting the Organizations' proposals.

The Carriers' most persuasive arguments arise out of the wage structure for operating employees, but are valid only with respect to road operating employees who enjoy the benefits of the mileage factor in the dual basis of pay. A substantial proportion of these employees have substantial amounts of time off while still earning at least the equivalent of 30 days' basic pay per month. Yard and assigned local freight employees, on the other hand, typically work full workweeks and months, and are compensated, in effect, on an hourly or daily basis.

We conclude that a "modernization" of the pay structure for the operating employees should involve the inclusion of holiday pay provisions for regularly assigned yard and local freight service employees as an element separate and apart from their basic rates of pay. We believe, however, that 7 holidays, rather than 9, should be recognized, since this is the pattern established for the nonoperating crafts. We believe further, that, in accordance with the pattern established for the nonoperating crafts and practices prevailing in a substantial segment of outside industry generally, payment for holidays worked should be at the premium rate of time and one-half in addition to holiday pay. Our conclusions with respect to this issue necessarily imply that, in the case of yard operating employees who have

"bought" their present holiday pay provisions, the purchase price should be restored to them through an equivalent increase in their basic hourly rates. This restoration is reflected in the pay structure recommendations made in chapter 9 of this report.

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties should negotiate a rule which will provide the following:

- 1. That regularly assigned yard, local freight, and miscellaneous service employees who are paid on a daily basis without a mileage component in their basis of pay, should, subject to appropriate eligibility requirements, be paid holiday pay equivalent to 1 basic day (at the rate for the class of service in which last engaged) for each of 7 specified holidays where any such holiday falls on the regular workday of the employee;*
- 2. That any such employee who works on any of such holidays should be paid, in addition to the holiday pay for which he is eligible, at the rate of time and one-half for all service performed on the holiday with a minimum, in addition to holiday pay, of one and one-half times the rate for the basic day.*

II. Differential for Night Work

The Proposal

The Organizations propose that employees in all classes of service be paid a night-work differential of 10 percent of the applicable hourly rate (based on weight on drivers or cars hauled, where applicable) for all time on duty between the hours of 6 p.m. and 6 a.m., in addition to all other compensation.

Discussion

A night-work differential existed for some classes of railroad operating employees as early as the 1880's. Just prior to the World War I period of Federal control of the railroads, the differential was approximately 2 cents per hour for yard foremen and helpers on some roads. In 1918, the Director General of the Railroads abolished such differentials, a result then favored by the Brotherhood of Railroad Trainmen, but opposed by the Switchmen's Union of North America. In 1920 the United States Railroad Labor Board denied a request of the Switchmen, which was opposed by the Trainmen, for reinstatement.

ment of a night work differential. Thereafter, there were no more demands for such a differential until 1945, when all of the Organizations made demands for a differential applicable to various types of service. Ultimately, these demands were withdrawn. Again in 1947 there was a renewal of demands which were ultimately withdrawn in the settlement reached in November 1947, with the Conductors and Trainmen, and, after rejection of the proposal by Emergency Board No. 57, in the settlement of August 1948, reached with the Engineers, Firemen, and Switchmen. Subsequently, in 1949, 1953, 1954, and 1956, various of the Organizations renewed demands for night differentials, but they were ultimately withdrawn. Thus, while night-work differentials existed at an early period for some classes of operating employees in some kinds of service, no such differential has existed for some 42 years. Nor do the nonoperating crafts have a night work differential.

The Organizations, in support of their proposal, contend there is inherent justification for a premium for night work because of the interference which night work entails in the employee's pattern of living, and because night work involves increased hazards and work burden in consequence of reduced visibility and the more severe impact, at night, of adverse weather conditions. It is asserted that the employee who works nights must forego normal forms of family, community, social, and recreational activities and must make adjustments to unnatural sleeping habits and to arrangements which involve not only health problems but increased job hazard. The Organizations further contend that the payment of premium rates for night work has become an established principle in outside industry, including those industries having continuous operations, so much so that "night shift differentials have become virtually universal in American industry." Thus, the Organizations assert that a night-work premium is justified for railroad operating employees not only as a matter of principle but also to accomplish a "modernization" of the pay structure for these employees.

The Carriers oppose the proposal on several grounds. They argue that night work, which is an essential and indispensable aspect of railroad service, is a condition of employment, like many others, known to the employee when he enters the industry, which therefore has been recognized and is compensated for by the existing pay structure. Hence, they argue that the Organizations' case, insofar as it is predicated upon personal and other inconveniences associated with night work, lacks merit. They contend that there is a complete lack of evidence that night work involves any increased hazard or burden of work, as compared with day work. They assert that outside industry comparisons fail to support the proposal because

of lack of comparability between railroad operations and operations in industry generally, including the factor of relative inability of the railroads to schedule work so as to avoid night work. Further, the Carriers contend that the history of the treatment of night-work differential demands by railroad operating employees indicates, on the whole, that the employees prefer uniform rates of pay for the same type of work, whether done by night or by day; that the introduction of a night-work differential would have a disruptive effect on currently established seniority practices which permit the senior employees to bid for day work; and generally, that the introduction of such a differential would lead to numerous anomalies and inequities.

The evidence introduced, and the studies conducted for the Commission, show that night-work premiums are common in outside industry generally, including continuous process industries, although they vary considerably in amount and are more prevalent in manufacturing than in nonmanufacturing industries. Among transportation industries there is no uniformity of practice. None of the major agreements in inland waterways, over-the-road trucking, or buslines provide for night-work differentials. In the airlines industry, most of the agreements provide night differentials for flight-deck personnel, and some provide them for ground-crew employees. In the maritime industry, some agreements in coastal and intercoastal shipping provide for premium payments for off-hour night watches while in port, and night-work premiums are common in longshore contracts. In local cartage and in local transit night-work premiums exist under some contracts, but not under others, and there is no predominant practice. These comparative data are inconclusive as a basis for decision of the question whether a night-work differential should now be established for railroad operating employees, when account is taken of the lack of uniformity of practice in transportation industries.

There is some merit in the Organizations' view that a "modern" wage structure includes recognition of the principle of a premium rate for night work. The most persuasive argument in support of such a premium is the personal inconvenience and disruption of normal living habits which railroad employees, like other employees required to work at night, must suffer. The contention that night work involves extra hazard and onerous working conditions is plausible, although there is little actual evidence in the record to support this claim. In the matter of detecting signals it may even be true, as the Carriers have suggested, that it may be somewhat easier to see signals at night than in the daytime.

We are persuaded on the whole, however, that a night-work differential should not be recommended in this proceeding. Since night work is so immutable a characteristic of railroad operations, there is

considerable force in the Carriers' contention that this is a working condition which must already be reflected at least to some immeasurable degree in the existing wage structure. Moreover, it seems probable that the combination of uniform rates for employees in each class of service with the operation of the seniority rules has the effect of building in the advantage of day work for the senior employees (who presumably exercise their seniority, if they so desire, to take such work) and the relative disadvantage to the less senior employees who (on the same presumption) must take the night work. To introduce a night-work differential would be disruptive of this practice.

RECOMMENDATION

It is not recommended that a night-work differential be adopted.

III. Away-From-Home Terminal Expense

The Proposal

The Organizations have proposed that specified allowances of 1 or more basic hour's pay be provided to cover the away-from-home terminal expenses of all road service employees. Specifically, the proposals provide the following allowances during layover periods at points other than home terminals:

- (a) 1 hour's pay for layovers of 4 hours or less;
- (b) 1 hour's pay for the next 4 hours or less;
- (c) 2 hours' pay for the next 5 hours or less.

The proposal further provides that such hourly pay be computed at the rate of the last service performed, be cumulative, be repeated for each 24-hour period of any layover, and be in addition to all other compensation.

Discussion

The Organizations take the position that the proposed allowances would give railroad operating employees what workers in other transportation industries already enjoy.

The Carriers contend that the dual basis of pay adequately compensates road operating employees for these expenses, and that wage increases sought by the organizations have in the past been supported on the grounds that away-from-home terminal expenses were increasing. Separate requests for specific allowances have been made

before, and have been rejected by the carriers in negotiations and by Emergency Board No. 81.

There is no national rule establishing specific allowances for away-from home terminal expenses as such. However, there is a national "away-from-home terminal rule" which provides that operating employees in pool freight and unassigned service will automatically be paid continuous time for 8 hours after the expiration of 16 hours released time away from home. Thus, the first 16 hours spent away from home awaiting a return trip to the home terminal are neither specifically paid for nor covered by any specific expense allowances. This rule has been in effect since 1948.

There is some allowance for away-from-home expense in the present pay structure, but the exact amount is impossible to determine. In the 1943 wage movement, which was finally arbitrated by President Franklin D. Roosevelt, the President's award, applicable to Engineers and Trainmen, determined "that 5 cents per hour effective immediately shall be paid as the equivalent of or in lieu of claims for time and a half pay for time over 40 hours and for expenses while away from home." An agreement incorporating the same amount was signed subsequently by the carriers and the other three operating labor organizations.

Emergency Board No. 81 in 1950 rejected the organizations' proposal for away-from-home terminal expenses, on the grounds that the held-away-from-home terminal rule (pay starting after 16 hours) and the dual basis of pay provides "road service employees in all classes a wage and earning structure which adequately compensates for services performed and expenses incurred away from home terminal." The Board recommended that the request be withdrawn.

Away-from-home terminal expenses have continued to increase since 1943 and even since 1950. While data relating to expenses of railroad employees are sparse, prices of lodging and of restaurant meals have generally risen in our economy since 1950. Expense records maintained by a railroad engineer for income tax purposes showed nearly a 40 percent increase between 1949 and 1960.

Allowances for these expenses in other transportation industries vary greatly. In airlines, there are specified monetary allowances for each meal away from home base, and "suitable lodging in a suitable location" is to be furnished by the company. There are generally no allowances for regular busline operators, but those employed as extra operators and on charter service on some buslines get a flat daily allowance for meals and lodging if they are held away from their home terminal, usually beyond specified periods. One over-the-road trucking agreement provides that lodging shall be furnished away from home, and for meal allowances on Saturdays

and Sundays, and after the 17th hour of the first layover. None of the agreements provides allowances related to the rates of pay employees, as the Organizations' proposal in this case does.

Some carriers provide lodging away from home for crews which formerly had assigned cabooses in which to sleep. Emergency Board No. 81 recommended in 1950 that assignment of cabooses be eliminated, and that carriers make proper provision for alternative lodging. Two organizations (the Conductors and the Trainmen) signed a national agreement providing equivalent facilities when cabooses were eliminated, to be negotiated on a local basis. A number of such agreements have been negotiated, but none provide meal allowance.

Facilities for lodging or meals are now provided on some carriers for the use of road service employees at away-from-home terminals. These facilities are ordinarily subsidized. Expenses in addition to those normally incurred when working in a fixed location are incurred by employees who must secure lodging away from home because of the nature of their work. It seems appropriate, therefore, that such employees receive some form of allowance to cover this expense over and above their regular compensation. Practices vary greatly in different sectors of the transportation industry but there is substantial precedent for an allowance of some type. Indeed, as noted above, a number of railroads have established the practice of providing subsidized lodging facilities. However, practices among carriers are diverse, and a uniform rule applicable to all road operating employees is desirable.

RECOMMENDATION

In view of the above considerations, it is recommended that the parties negotiate a national rule requiring each carrier to provide suitable lodging or equivalent allowance for all road service crews (except short turnaround passenger crews) when they are obliged to be at a terminal other than their home terminal five (5) hours or more.

EMPLOYEE ASSIGNMENTS

CHAPTER 11

Interdivisional Runs

The Proposal

The Carriers propose the elimination of all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees which prohibit or restrict the Carriers' right to establish, move, consolidate, or abolish crew terminals, merge or consolidate seniority districts, or establish interdivisional, interseniority district, intradivisional and intraseniority district runs. The proposal also calls for the elimination of all agreements, rules, regulations, interpretations, and practices which prohibit or provide penalties for running crews through established crew terminals or provide for automatic release of crews upon arrival at terminals or end of run, or when off any assigned territory.

The Carriers' proposal contemplates the establishment of a rule which would permit a Carrier to make any of the types of changes outlined above and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in either assigned or unassigned service (including extra service), on either a one way or turnaround (including short turnaround) basis and through established crew terminals subject to the following conditions:

(1) The Carriers would be required to distribute mileage ratably between the employees of the seniority districts affected.

(2) Where a new run is established, in a situation in which a carrier does not now have the unilateral right to establish such a run, and where the run would include the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for the class of service, notice would be given to the organizations involved and an effort would be made to agree on the conditions which would apply if the change were effected. Upon failure to agree the matter would be referred to binding arbitration. The authority of the arbitrator would be limited to deciding what protective conditions must be met, if and when the run should be established.

The right to operate such runs as may be established under the Carriers' proposal would not be subject to the imposition of any restrictions as to class of traffic which may be handled or as to the origin or destination of any empty or loaded cars moving on such runs.

Discussion

The Carriers' proposal in the main is directed to obtaining the right (where it does not now exist) to establish runs which extend over territories where more than one group of employees hold seniority rights. Although the Carriers have referred to these runs as interdivisional, interseniority district, intradivisional and intraseniority district, in our discussion we shall use the term "interdivisional runs" as applying to all runs of these types.

By and large present-day railroad operating divisions were established when steam locomotives were the primary source of motive power and the length of divisions was determined largely by the operational range of the steam locomotive. While steam locomotives could run greater or lesser distances dependent upon such factors as the length and weight of the train, nature of the terrain, and weather conditions, they normally required attention after approximately 100 miles. Consequently, facilities for fuel and water and for running maintenance were provided at points approximately 100 miles apart. Each point was designated as a division point and the distance from one point to the next was termed an operating division.

Operating divisions generally constituted the territory over which employees in road service accrued seniority. Hence seniority districts were established which were practically coextensive with operating divisions. In some instances, more than one seniority district was established within an operating division. Because of these seniority arrangements, when a carrier sought to operate a crew over more than one seniority district the rights of men on their home seniority district had to be taken into account. Thus, there developed a practice of prorating (or "distributing ratably") the mileage accrued on interdivisional runs between the employees in the seniority districts over which such runs operated.

As railroads were built and extended it was, of course, impossible for the Carriers to establish division points exactly 100 miles apart. Factors such as terrain and the locations of towns and industries had to be taken into account. As a result there are divisions less than 100 miles in length and others which extend over more than 100 miles. Except when working in interdivisional service road crews are normally confined to operating within their own seniority districts. Since seniority districts are generally coextensive with divisions, many road service employees are restricted to working less than 100 miles in a

assignment, and the carriers by application of the basic day rule are in these cases required to pay for miles not run. To illustrate: the present basic day rule applicable to freight service provides that a basic day shall consist of "100 miles or less, 8 hours or less." Thus, a crew operating solely over a division of 80 miles must be paid (in addition to any other special payments, e.g., arbitraries) for an additional 20 miles not run. This is known as "constructive mileage." The basic day rule in passenger service brings about a similar result.

When crews are restricted solely to operating in their respective seniority districts, stops must be made to change crews, as well as to change cabooses, despite the fact that otherwise there would be no need for such stops. The practice of changing cabooses grows out of the traditional requirement that train crews be assigned their own cabooses. This requirement has been relaxed since the adoption of a national rule (following a recommendation of Emergency Board 81 in 1950) which permits the "pooling" of cabooses (use of the same caboose by consecutive crews on a given run). This, however, does not eliminate the necessity of a stop to permit a crew change.

During the steam era, particularly as the design and operating capabilities of steam locomotives were improved, restriction of runs to given divisions slowed down the movement of traffic. That effect is now more marked because of the development of the diesel as well as other advances in technology, such as centralized control of signaling and traffic. Changes in the right of way, such as elimination of some grade crossings, and reductions in grades and track curvatures have also facilitated the movement of traffic. These developments have resulted in an increased potential for nonstop operation of trains over greater distances.

A survey made by the Carriers in July 1958 on the major railroads indicated that a considerable number of crews were assigned to runs involving less than the minimum number of miles encompassed within a basic day. For example, in through freight service approximately 20 percent of the runs were 95 miles or less. Over a third of these runs were completed in less than 5 hours. The results of the survey with respect to other crew members were similar. In general the findings of this survey were borne out by the pay structure study conducted by the staff of the Commission. For example, in the Commission study slightly over 20 percent of engineer assignments in through freight service were on runs under 100 miles.

Examples were cited by the Carriers to illustrate the frequency of crew changes on given runs. On a Santa Fe through freight run between Chicago, Illinois and Richmond, California (a distance of 2,485 miles), for example, engine crews were changed 19 times. The maximum total time on duty of any one of the 20 crews handling

this train was 5 hours and 25 minutes; the minimum was 2 hours and 10 minutes. Average time on duty was 3 hours and 28 minutes. Of course, less time was spent in the actual running of the train by the various crews assigned. In connection with crew changes it should be noted that the carriers must maintain terminals for that purpose and on occasion incur additional expense in the nature of initial and final terminal delay payments.

From the early days of railroading until the early 1930's there did not appear to be much question about the right of management to establish, arrange or rearrange runs in interdivisional service, subject only to the condition that mileage be equitably apportioned between the men on the seniority districts involved. Beginning about 1937, several National Railroad Adjustment Board awards held that carriers had no right to establish interdivisional service without agreement with their employees, despite express provisions in the collective bargaining agreements providing formulae for dividing mileage on runs covering all or a portion of two divisions. A review of a number of these awards reveals both inconsistency and conflict of opinion. This probably accounts to some extent for the fact that today some carriers have considerably more latitude than others in establishing interdivisional service, depending upon whether they received favorable or adverse awards when their rights were questioned.

It appears that the first step which the carriers took to obtain a national rule permitting the establishment of interdivisional runs was in the 1945 national wage and rules movement. Nothing significant with respect to this matter was accomplished in these negotiations. Eventually, in May of 1951, the Brotherhood of Railroad Trainmen agreed to a national rule concerning the establishment of interdivisional service. Under that agreement the carrier and employees involved were to negotiate on proposed runs and make reasonable and fair arrangements in the light of the interests of both parties. The agreement provided for eventual resolution of the matter by final and binding arbitration.

The Engineers, Firemen, and Conductors were not parties to the 1951 Trainmen agreement. In 1952 these organizations agreed to the establishment of a national rule similar to that of the Trainmen but with one significant difference. The 1952 agreements provided that where individual carriers did not have the right to establish interdivisional runs, and proposed to do so, the matter would be subject to negotiation, mediation, and eventually, referral to a national committee composed of the chief executives of the organizations involved and an equal number of carrier representatives. If the national committee failed to agree, a neutral chairman was to be selected to sit with the committee and make representations and nonbinding

recommendations. Apparently, because of a feeling that the 1951 Trainmen's agreement availed little so long as the other organizations were not bound in the same manner, the carriers agreed to bring the 1951 Trainmen's agreement into conformity with the others. The rule incorporated in the 1952 agreements has not been changed since its adoption and it is presently applicable to the four operating brotherhoods other than the Switchmen, who do not represent road operating employees.

In essence, the Organizations' objections to the Carriers' proposal are based on the argument that this is a matter which is better left to local collective bargaining. The Organizations are also concerned with the economic and social consequences of rearrangements in runs. They fear that the Carriers will establish extremely long runs with concomitant increases in hours on duty; that constructive mileage will be absorbed; that there will be loss of job opportunities and that it will be necessary for employees continually to shift their residences because of frequent changes in the location of terminals, with consequent adverse effect not only upon the employees involved but also upon the communities in which they reside.

We are in sympathy with the Organizations' view that the institution of interdivisional service and the conditions relating to its establishment are legitimate subjects for collective bargaining. Therefore, we reject the proposal of the Carriers insofar as it would give management nonreviewable discretion to establish interdivisional service. We sincerely hope that all problems which may arise in this area will be resolved by the collective bargaining process. We are convinced, however, that, failing agreement, there should be provision for terminal resolution of the differences between the parties rather than ultimate disposition by economic force. We are further convinced that the 1952 agreement does not provide efficient machinery for the resolution of disputes in this area. The probable increase in the rearrangement of runs to accommodate the revised basis of pay rules makes even more necessary improved machinery for the expeditious adjudication of questions arising in connection with the establishment of interdivisional service.

Experience on carriers which presently have the right to establish interdivisional runs indicates that the Organizations' fears that unduly burdensome runs would be established are not borne out by historical facts. However, to guard against arbitrarily long runs and resultant burdensome working conditions, provision can be made for review by a neutral whenever it is claimed that a proposed run would result in burdensome working conditions.

With respect to the absorption of constructive miles, we see no basis in reason why the Carriers should not be permitted to rearrange runs

to absorb these miles. Under the present basic day rule the carrier guarantees an employee who reports for duty a full day's pay; this payment is made even though the employee is not furnished sufficient work to occupy him for the length of the workday or is not required to perform the full measure of the task prescribed as the equivalent of a day's work. This means that a road service employee who operates less than 100 miles is not penalized because of the employing carrier's present inability to arrange its operations so as to utilize him to the normal extent, and he is paid as if he had been so utilized. When an employer in industry generally is unable to use the services of an employee to the extent contemplated by the agreed wage there is no justification for concluding that the employee acquires an equity in the continuance of that situation. When conditions change so that the employer is able to use the employee's services to the full extent of a day's work or task, as defined in the collective bargaining agreement, it is only fair and equitable that the employee respond without the expectation of anything more than his agreement requires. It is true that where constructive mileage can be absorbed there could be, theoretically, a minimal loss of job opportunities but this has always been a latent aspect of the agreement, as carriers have been able to lengthen runs up to 100 miles within a seniority district. In all other respects, with mileage proration the establishment of interdivisional runs *as such* would have no effect on employment opportunities for the employees who man the trains.

It is, of course, not pleasant to be required to uproot a family, break community ties and move to another locality to maintain one's employment. Mobility, however, has always been characteristic of many kinds of employment. Prudent management does not arbitrarily make changes which require relocation of personnel, but economic necessity frequently dictates change.

Enlightened employers recognize that employees should be protected from some of the adverse effects which may be attendant upon a managerial decision to relocate facilities. Such protection usually takes the form of assuring employees that they will suffer no losses in the sale of their homes because of decreased market values occasioned by such decisions to relocate and reimbursing them for moving expenses.

The adverse effects upon a given community of a relocation of an industrial facility involving the movement of a number of people raises problems involving serious social and economic implications. While in such a situation one community may be adversely affected, another is beneficially affected. This is a normal concomitant of progress and change in an industry so widely dispersed as is the railroad

industry and raises questions beyond the scope of this Commission's task.

We believe that there are important advantages which should accrue to employees when longer runs are established. They can accumulate more mileage per trip which, in turn, would lessen the number of away-from-home layovers required to earn the same amount of mileage. The elimination of some advance reporting time and of some stops would also contribute to cutting down the amount of time required to accumulate the same amount of mileage or earnings.

The efficient, expeditious movement of trains requires as a matter of public interest that machinery be devised under which the Carriers will be able to propose and eventually secure definitive judgment with respect to the establishment of interdivisional runs. The parties to the Trainmen's Agreement of 1951, which in many respects is a model agreement on this subject, clearly recognized this need. We do not feel that the solution to the problem is to go back to some of the earlier rules which allowed complete freedom to the Carriers to establish interdivisional runs subject only to proration of mileage, which is essentially what the Carriers now propose. Since the turn of the century there has been increasing consciousness of the importance of factors other than the retention of job rights in connection with geographical shifts of employment, and of the impact of dislocations on obligations incurred by employees in anticipation of continuous employment in a given locale. Recognition of these factors is basic to any proposed rule in this area.

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties negotiate a national rule which will incorporate the following:

1. Provision for recognition of the right of a carrier, subject to the requirements of paragraphs 2, 3, and 4 below, (a) to establish runs in interdivisional service as defined in the first paragraph of the preceding discussion, (b) to establish, move, consolidate or abolish crew terminals in connection therewith, (c) to operate such runs in assigned or unassigned service (including extra service) on a one way or turnaround basis (including short turnaround) and through established crew terminals; and on such runs to handle any class of traffic as may be required regardless of origin or destination.

2. Provision for subjecting the aforesaid right to the qualifications (a) that such interdivisional runs as are established shall not

create working conditions that are unreasonably burdensome or onerous; (b) that the mileage on such interdivisional runs be distributed ratably as between employees from the seniority districts affected; (c) that employees required to move their homes as the result of the establishment, movement, abolishment or consolidation of crew terminals be protected against loss from sale of their homes, be compensated for moving expenses in connection with any such moves, and be given reasonable allowance for wage loss directly attributable to the time involved in relocation; and (d) that the carrier shall not arbitrarily establish, move, consolidate or abolish crew terminals so often as to require unduly frequent relocation of homes of employees affected.

3. Provision that where a carrier proposes to establish new runs in interdivisional service or to rearrange existing runs in interdivisional service it shall give reasonable written notice (such as 15 days) of the proposed runs to the representatives of the employees involved and:

(a) Following the notice period, the parties shall negotiate in good faith with respect to matters set forth in paragraph 2 above.

(b) If after a negotiating period, not to exceed 60 days, the parties fail to agree, the matter may be submitted by either party for final and binding determination by the special tribunal referred to in recommendation 2 of part I of chapter 6. The tribunal shall determine, in accordance with the qualifications set forth in paragraph 2 above, whether or not such runs may be established and the conditions to be attached to the establishment of such runs.

(c) The award of the tribunal shall be final and binding except that it may not require the carrier to establish the proposed run. The decision of the tribunal shall serve as a bar to the carrier from proposing the same or similar runs for a period of at least one year from the award.

4. Provision that the initial rearrangement or establishment of interdivisional runs shall be made by the carrier in the form of a general or overall proposal within an agreed period of time (not to exceed 1 year) following the adoption of this rule. Any unresolved disputes concerning the proposed runs should be consolidated in one proceeding for submission to the special tribunal. The carrier shall not propose any further changes in interdivisional runs for a period of at least 6 months after the disposition of the initial group of proposals. Any further proposals

for new runs or rearrangements of existing runs should thereafter be governed by the procedure set forth in paragraph 3 above.

5. Provision that on carriers which now have the right to establish such interdivisional service, the rights described in paragraph 1 above shall be applicable to the operation of such existing interdivisional service, and that paragraphs 1, 2, 3, and 4 above shall be applicable to the rearrangement of existing runs and to the establishment of new runs in such service.

The matter is one of much gravity because a failure to recognize or observe the principles involved may and has resulted in requiring payment of two extra days pay for a few minutes work, i.e., to the man who performs it, one day for his regular work and an extra minimum day for the additional work and a minimum day to the man denied the work.

The reasons are simple; as to the first man (the one who performed the work) the schedules contain separate articles governing road and yard work and as to each a basic day is provided of eight hours or less, 100 miles or less, etc. Consequently if either a road or yard man does fifteen minutes yard work and that is all there is of it for him to do, he is entitled to a minimum day for it although before or after doing it he may earn a day or more at road work. It is not correct to refer to it as a penalty; it is simply literal compliance with the express terms of the contract. As to the second man, i.e., the one denied the work, it is universally recognized that, if by virtue of his seniority rights—and they too are in part of the contract—he is entitled to perform certain work and that privilege is denied him and the work turned over to another, he should be compensated for his availability the same as though he had performed the work; and that likewise is not a penalty but merely the carrying out of the contract. Some schedules contain specific provision as to what the compensation shall be less than a full day, as for example run-around rules allowing fifty miles (half a day) and the right to stand first out, but, when the schedule is silent as to what the compensation shall be, the only basis available is the minimum day rule. This Division has so decided in many cases.

Although there is a degree of consistency in connection with payments required when there is a crossing of the line of demarcation between road and yard work the awards of the First Division of the National Railroad Adjustment Board, as well as those of earlier tribunals, are not uniform with respect to where that line should be drawn. This has prompted some carriers to seek what have been characterized as "escape" agreements in an attempt to clarify the situation on their properties and to avoid potential liability for multiple payments for the performance of a given task. A typical agreement of this nature provides for the maintenance of a given number of yard assignments, describes conditions under which road crews may perform certain switching in yards with no additional compensation other than that required under terminal delay rules and provides (in addition to the road pay) for payments ranging from actual time spent in switching in the yard with a minimum of 1 hour to a minimum day (regardless of the amount of time spent in switching in the yard).

C. The Problem Areas

The problem areas in connection with the line of demarcation between road and yard service fall into three main categories:

- (1) Restrictions upon the work which road crews may perform in yards.

(2) Discontinuance of assignments of yard crews where the amount of yard work has decreased to a minimal amount.

(3) Extending and contracting switching limits.

1. Restrictions on Road Crews Performing Work in Yards. The Carriers conducted a survey by questionnaire of 26 Class I line-haul carriers to determine current practices with respect to restrictions upon road crews performing work within switching limits. There were 13 different categories of work functions covered in the survey and the participating carriers were asked to signify whether there were any absolute or qualified restrictions upon road crews performing such tasks at initial terminals, intermediate points, and final terminals and to show whether the restrictions varied if (a) yard crews were employed and on duty, (b) yard crews were employed but not on duty, and (c) yard crews were not employed.

The 13 items of work involved were as follows:

Road crews accompanying or handling engine of own train in freight service.

Road crews accompanying or handling engine of own train in passenger service.

Road crews handling caboose of own train in freight service.

Road crews picking up and/or setting out cars of own train from or to more than one track in freight service.

Road crews picking up and/or setting out cars of own train from or to more than one track in passenger service.

Road crews picking up cars from and/or setting out cars to more than one yard of a terminal in freight service.

Road crews picking up cars from and/or setting out cars to more than one point in passenger service.

Road crews picking up cars from and/or setting off to other than main, running, departure, or receiving tracks in freight service.

Road crews picking up cars from and/or setting off to other than main or station tracks in passenger service.

Road crews cutting out bad order cars, no-bill cars, etc. in freight service.

Road crews cutting out bad order cars in passenger service.

Road crews performing switching not in connection with cars of own train in freight service.

Road crews performing switching not in connection with cars of own train in passenger service.

CHAPTER 12

Combination of Road and Yard Service

The Proposals

The Carriers propose the elimination of prohibitions or restrictions on the following activities:

- (1) Use of passenger crews to perform switching or station work in connection with the cars of their own trains or to handle "light" engines of their own trains.
- (2) Use of road crews in other than passenger service to perform any and all switching and station work and to handle light engines of their own trains.
- (3) Use of yard crews to perform road work, or to perform work outside of switching limits.
- (4) Right of management to designate or change switching limits or to establish or abolish yard or hostling service assignments.

The proposal contemplates the elimination of arbitraries, special or constructive allowances or penalty payments to any employee, or class or grade of employees, when road or yard crews perform any of the above described work.

The Carriers' proposal would establish a rule to provide that:

- (1) Passenger crews would be required to perform any and all switching and station work in connection with cars of their own trains that might be required of them at their initial and final terminals and at all intermediate points.
- (2) Road crews in other-than-passenger service would perform any and all switching and station work as might be required of them at their initial and final terminals and at all intermediate points, including the handling of "light" engines of their own trains, whether or not such switching and station work was in connection with cars of their own trains.
- (3) When switching or station work is performed by road crews as provided in (1) and (2) above, such work would be

paid for as part of the road day or trip and additional compensation for such work would not be paid under road, yard or hostling rules and regulations. These provisions would apply whether or not yard crews, yard men, or hostlers are on duty when and where the work is performed.

(4) Yard crews would be required to perform both road and yard service and would also be required to perform service outside of established switching limits. Where such service is performed by a yard crew the work would be paid for as part of the yard day or tour of duty and additional compensation would not be paid for such work under either road or yard rules and regulations. These provisions would apply whether or not road crews are available when and where the work is performed.

(5) Yard crews, yard men, or hostlers would not be entitled to any penalty pay when road crews perform switching or station work or handle the light engines of their own trains; nor would road crews be entitled to any penalty pay when yard crews perform road work or perform service beyond switching limits as provided in (4) above.

(6) Management would have the exclusive right to designate and change switching limits, and to establish or abolish yard and hostling service and yard and hostling service assignments.

The Organizations propose that further combination of road and yard service be prohibited.

Discussion

A. Nature of the Issue

In our discussion of the basis of pay proposals we indicated that there are entirely separate and distinct methods of compensating employees engaged in road service and of compensating employees engaged in yard service. In addition to the distinction in method of compensation, distinction has evolved with respect to the type of work which may properly be performed by employees in the one class of service as opposed to employees engaged in the other. At the present time, mainly as a result of rulings by the Director General of Railroads, arbitration awards and interpretations of collective bargaining agreements by various railway labor tribunals, many work functions are held to be exclusively within the "jurisdiction" of the road service employees and others within the "jurisdiction" of the yard service employees. Thus, a line of demarcation has arisen between the two services which may not be crossed by the carriers in making daily work assignments without incurring liability for penalty payments. It is this line of demarcation which the Carriers seek to erase.

Generally speaking, road service involves the movement of trains between two points or terminals. Yard service involves the movement or shunting about of cars to put a train together and make it ready for the road. The latter is commonly referred to as switching service.

Although yards vary greatly in size, purpose, and amount of activity, the general concept of a yard is an area consisting of a system of tracks within defined limits for the making up of trains, storage of cars, or other purposes. The term "switching limits" is generally used when referring to the boundaries within which yard crews may perform work. It is not to be confused with the term "yard limits". The two terms are not synonymous. Switching limits, having once been established by the carriers and the organizations, cannot be changed except by agreement. Yard limits, on the other hand, are designated by the carrier for operational purposes and generally they can be changed by unilateral action by the carrier.

The typical yard service employee, as we have pointed out earlier, reports for duty at a given point at a stated time and is released at the same point after the completion of his normal 8 hour tour of duty.

B. The Historical Background

In the very early days of railroading there was little separation of the two classes of service. In this respect the following remarks appearing in a study appended to the 1917 report of the Eight-Hour Commission are quite pertinent:

In earlier days before separation and division of labor were so fully recognized in railway practice as at present, a single crew made up the train at initial terminal, took it over the road and put it away at its destination. This practice still pertains to some extent in passenger service.

In the agreements negotiated by the Organizations and the Carriers in the late 1890's and the early 1900's, some contained provisions affecting road crews working in yards and yard crews working on line of road. Where those agreements contained clauses with respect to a combination of road and yard service in one assignment, they generally were addressed only to the amount of compensation which the road crew would receive. In rare instances provision was made for yard crews performing work beyond switching limits. An interesting example of this is to be found in a 1910 Mediation Agreement between certain Southeastern carriers and the Brotherhood of Railroad Trainmen which provided that yardmen required to perform service outside of switching limits would be paid miles or hours whichever produced the greater compensation for the class of service performed with a minimum of 1 hour; this compensation was to be paid

in addition to the regular yard pay without deduction for the time consumed in such service.

In a 1913 arbitration award disposing of a controversy between the Burlington Railroad and both the Conductors and Trainmen, the arbitrators refused to grant a request of the employees for a rule providing that road crews be given all work outside yard limits and that yard crews not be run outside yard limits except in cases where the main line was blocked and there were no trainmen available. That award did, however, grant a rule providing:

At points where yardmen are employed and are at the time in actual service, trainmen will not be required to handle trains or engines to or from yards and depots, nor to pick up or set out cars, nor to couple or uncouple air, signal or steam hose, nor to couple or uncouple safety chains, nor to do other work usually performed by car men where car inspectors or car repairers are employed.

During the period of Government control of the railroads in World War I the Director General issued Supplement No. 25 to General Order No. 27 under date of December 15, 1918, which provided as follows:

ARTICLE X.—ARBITRARIES AND SPECIAL ALLOWANCES

(a) Excepting payments under rules applying to work performed at initial and final terminals, and to final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.

On roads where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended.

(b) Where the special payments under the rules, regulations, or practices which are retained under section (a) have been allowed independently or separately from the trip, they will continue to be so allowed, but at the former rates.

ARTICLE XX.—ARBITRARIES AND SPECIAL ALLOWANCES

(a) Where it has been the practice or rule to pay a yard crew, or any member thereof, arbitraries or special allowances, or to allow another minimum day for extra or additional service performed during the course of or continuous after end of the regularly assigned hours, such practice or rule is hereby eliminated, except where such allowances are for individual service not properly within the scope of yard service, or as provided in section (b).

(b) Where regularly assigned to perform service within switching limits, yardmen shall not be used in road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the

greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay and without any deduction therefrom for the time consumed in said service.

This directive although captioned "Arbitrariness and Special Allowances" clearly affected the combination of road and yard service and it appears to be the first national rule on the matter. Despite the Carriers' assertion that the pronouncements of the Director General gave no credence to a real separation between the two services, it is implicit in the language of this General Order that the Director General recognize some separation.

From 1918 to date, the road-yard issue has been dealt with on a number of occasions by various tribunals concerned with the interpretation of railroad collective bargaining agreements. Reference to a few of their awards will suffice to indicate how the current concepts with respect to the separation between the two services developed.

Railway Adjustment Board No. 1 in a 1918 award held that yard limit boards could not be moved by management if a question of compensation was involved. In another award that Board said that it did not countenance the extension of the practice of using road crews to do yard work or using crews to perform other service after the completion of their day's work, or the practice of requiring road crews to do excessive switching at terminals. In still another case the Board sustained a claim for a minimum day's pay in road service in addition to the day's pay for yard service when a yard crew was assigned to a road trip during the course of its tour of duty.

The Railroad Labor Board (1920-26) decided a case in which it held that a road brakeman was entitled to an additional day at yard rates when he performed some switching work upon arrival at his terminal. In another case it held that a yard crew was entitled to be paid a minimum day because a road crew made up its own train on a holiday when the yard crew assignment was annulled.

In 1938 the First Division of the National Railroad Adjustment Board issued an award which has been often cited in subsequent decisions of that Board. In its findings the Board set forth its view with respect to payments due when a road crew was required to perform yard service or a yard crew was required to perform road service. The following language of this Board appearing in its findings in that case quite accurately reflects the current thinking of the Board:

As stated in Award No. 3110 this Division has held scores of times, in substance, that, in the absence of schedule or special agreement, road and yard work may not be combined in one assignment without incurring liability:

(a) to the men performing the work, for a minimum day in each capacity; and

(b) to men available but not used, entitled by seniority to the work and denied the right to perform it, the attendant pay of the work.

It is clear from the survey that there is no uniformity among the various railroads in the extent to which road crews may be required to perform the various tasks set forth without penalty. Generally speaking, more restrictive conditions were found to affect work at terminals than at intermediate points. Further, conditions were most restrictive when yard crews were on duty, less restrictive where yard crews were employed but not on duty, and least restrictive where yard crews were not employed.

The effect of these restrictions upon the carriers' operations can readily be seen by citing a few examples. On many railroads, in yards where yard crews are employed, when a road train has been made up and it becomes necessary to switch out a defective car or a car without proper billing, the yard crew must be used to switch out such cars despite the fact that the road crew is on duty on the train and its engine coupled to it. This entails getting a yard engine and crew up to the train and setting aside the road engine while the yard crew does the work involved. In some instances the yard engine couples on to the road engine and remains coupled while it goes about its work. On some properties, when a road train arrives at a terminal and it becomes necessary to change cabooses, the road crew may stand by while the yard crew performs the service. In other situations, the road crew is restricted to picking up only at one yard in a terminal consisting of two or more yards; it is, therefore, necessary for yard crews to bring "cuts" of cars to the departure yard from distant yards before departure of the road train even though the road train may pass the same yards on its way out of the terminal and by a simple switching move could pick up the cars. A similar situation exists in connection with the movement of an inbound freight train. If the road crew is restricted from setting off in more than one yard on its inbound trip it may pass yard tracks to which cars in its train are destined. It must move those cars to the terminal yard in which it is to dispose of its train and a yard crew is then required to handle such cars back to the point of destination.

2. *Discontinuance of Yard Assignments.* Because of restrictions upon road crews performing switching, many carriers, to avoid penalty payments, have retained yard crews where there is only a minimal amount of switching. The Carriers have cited a number of examples of yard crews paid for at least 8 hours on duty and performing from 2 hours to 4½ hours of work per day. In the preponderance of the examples cited in the Carrier study about 3 hours work per day was performed. In the Carriers' exhibit on this phase of the road-yard question, one of many similar examples given is as follows: at Jonesboro, Arkansas, the St. Louis and San Francisco Railroad Company

maintains a yard engine which performs about 2 hours work per day and handles on the average about 20 cars per day. These generally are loaded cars which the yard crew delivers to consignees. The crew also relocates cars from the industry sites to the yard area. On the day of the Carrier's survey the crew went on duty at 8:30 a.m. and completed all its work by 10:30 a.m.

A joint agreement, dated December 12, 1947, between the carriers and the Conductors together with the Trainmen contained the following clause with respect to abolishment of yard service assignments:

Remanded to individual Managements and General Committees for negotiations whereby the last remaining yard assignment in a particular yard may be abolished where yard service requirements have decreased to a point that abolishment is justified.

The other three operating organizations did not reach accord with the carriers in the general movement which resulted in the agreement cited. That dispute was then referred to Emergency Board No. 57 which filed a report, dated May 27, 1948, in which the Board stated:

The problem involved in this proposal affects all crafts engaged in yard work and can best be solved through the application of the processes of collective bargaining. Because of the absence of some of the parties concerned we are constrained to remand the matter, without more comment, to subsequent negotiations, first, on an industry-wide basis, and failing settlement there, to local negotiation.

According to Carrier testimony, the attempts of individual carriers to negotiate rules which effectively permit the abolishment of yard service have met with little success in the majority of instances.

3. Switching Limits. As appears from our discussion of the historical development of distinctions between road and yard service, there were also restrictions on yard crews performing work on the road. Early in 1950 the carriers took steps to secure relief from these restrictions.

The Switchmen's Union of North America and the Western Carrier Conference Committee entered into an agreement, dated September 15, 1950, which in effect afforded the carriers involved the right to expand and contract switching limits to conform to the needs of the service. This agreement has been extended to cover all carriers on which the Switchmen's union represents the yardmen.

The Carriers represented by the Eastern, Western, and Southeastern Carriers Conference Committees entered into a national agreement, dated May 25, 1951, with the Brotherhood of Railroad Trainmen. Under the agreement the carriers were afforded the right to use yard crews to serve new industries provided, the switch governing movement

from the main track to the track serving the industry was located at a point no more than 4 miles from the existing switching limits. The agreement also provided for negotiation, mediation, and final and binding arbitration with respect to proposed changes in switching limits. Agreements of the same nature were consummated with the other three organizations representing operating employees under date of May 23, 1952.

D. Analysis

The proposal as made by the Carriers involves broad and sweeping changes in the traditional concepts of the separability of road and yard service. The record does not support the need for such changes although there is ground for relief in some of the areas we have heretofore discussed.

Extension of Switching Limits. There is little need to discuss at length the question of extending switching limits. The agreements with the five Organizations representing the operating employees in most respects appear to be working satisfactorily. The Carriers have attained a degree of flexibility in the use of yard crews to service new industries and in most instances road service employees affected are protected by provision for "equalization of time" spent by yard crews working beyond the switching limits. The machinery provided for the extension of switching limits has been working well; so well, as a matter of fact, that in the majority of instances in which the carriers have proposed switching limit extensions, agreements have been reached without resort to arbitration. Accordingly, there is no need to disturb the existing situation in this area.

Road Crews Performing Work in Yards. It is clear that the line of demarcation which has been drawn between road and yard work has given rise to a number of inefficient and wasteful practices, particularly with respect to road crews performing work in yards. There are a number of tasks or work functions which are common to the normal duties of employees whether engaged in road or in yard service. As a matter of fact, at points where yard service has never been maintained the work which a road crew may be required to perform without any payment (other than the wages for a normal road day) is generally indistinguishable from that which yard crews at other points perform as part of their regular assignments. Further, there are tasks which yard crews under the present rules perform at points beyond preexisting geographical switching limits which are also identical to those which the road crews perform. Employees in both services work with the same equipment and use essentially the same skills in the performance of their work assignments.

In the light of the foregoing, it can hardly be said there are true craft lines between road and yard service although the jurisdictional lines which have been drawn are in many respects similar to those which are drawn between the work of true crafts as that term is commonly used in industrial relations parlance. The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during the same tour of duty), is in effect on a number of railroads. Many thousands of operating employees hold these rights. This, too, is not a common characteristic of a craft-oriented labor force.

The Carriers' proposal for all practical purposes would completely obliterate the distinction between road and yard service. They propose a merging of all road and yard seniority lists to lessen the impact upon the employees who would be affected. This ignores other factors involved. For instance, indiscriminate combination of the two services in one tour of duty would lead to confusion in the application of bidding, assignment, and pay rules.

The Organizations resist the Carriers' proposal on the ground that the entire field should be left to local collective bargaining. There are, however, a number of factors which inhibit local collective bargaining on this subject. One of the paramount difficulties is the pattern of representation of train and engine service employees. Frequently, four or five organizations represent the operating employees. It is most unusual to find only one or two organizations representing them. It has already been seen that there has been little progress with respect to this problem on the national level when less than all of the organizations affected are involved in the same movement. Similar difficulties are encountered on the local level. As a practical matter, of course, it avails little to reach agreement with one group of operating employees in this area when the other groups are unwilling to enter into similar agreements. Another factor which inhibits local collective bargaining in this area is the adoption of national or constitutional policies regarding the separation of road and yard service by some of the organizations.

We are convinced that a national rule governing the work which road crews may perform in yards is necessary. A rule should be established which affords the Carriers a more uniform and flexible operation consistent with the recognition that there are either separate seniority rights to road work and yard work or other rights dependent upon some sort of separation between the two services. For all practical purposes, this also requires a recognition of the principle that the work functions of the two services cannot be so completely compartmentalized under all circumstances as to prohibit employees

in one of the services from performing the same kind of work which employees in the other perform. In other words, it should be accepted that there are gray areas in the work required in yards where, under certain circumstances, either road crews or yard crews may be used to perform the same type of work without penalty.

The statement of the principle is somewhat easier than its implementation. The provisions of the rule should be based upon a rule of reason. It should be recognized that the prime function of the road crew is to get the train over the road and that of the yard crew is to classify and put the train together. Recognition should, however, be given to the fact that there is switching work which reason and necessity dictate should be performed by road crews as an incidental part of their day's work. Naturally, the amount and extent of such work should vary in accordance with whether or not yard crews are employed at given locations. Greater freedom should be afforded the carriers to use road crews in switching where yard crews are employed but not on duty than where yard crews are on duty. There should be little or no restriction on the work which road crews may perform in yards where there are no yard crews employed.

Discontinuance of Yard Engine Assignments. Experience under the present national rule which expresses general principles and refers specific cases to local bargaining for resolution indicates the need for a new national rule prescribing conditions under which the carriers may discontinue the last remaining yard engine at a given location or on a given shift. We do not wish to imply that local collective bargaining on this subject has been totally ineffective. A number of local agreements on this subject have been negotiated. On these properties both parties commendably realized that where switching requirements are substantially reduced the carrier should have the freedom to abolish yard assignments and permit road crews to perform switching without additional payment either to the road crew performing the work or to any yard crew. In these agreements varying standards have been used to determine the extent to which the yard service requirements must diminish before the carrier may abolish the yard assignments—a preponderance use a standard of 4 hours averaged over a specified number of days. This appeals to us as a reasonable standard which should be applied in two ways: first, in determining when the carriers should have the right to discontinue yard engine service and in determining when the carriers should reestablish such service; second, the standard should be applied not only to the discontinuance of last yard engine assignments at a given yard but to the discontinuance of such assignments on any shift in yards where two or more shifts of yard engines are assigned.

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties negotiate a national rule which will incorporate the following:

1. Provision should be made that, regardless of whether yard crews or hostlers are employed or are on duty, road crews may be required (a) to accompany or handle engines of their own trains from engine facilities or ready tracks to departure tracks or from arrival tracks to engine facilities or ready tracks, (b) to switch out defective or "no bill" cars from their own trains, (c) to handle cabooses of their own trains and to exchange cabooses from one train to another, provided the road crew handles either train into or out of the terminal, (d) to pick up or set out cars of their own trains as required from or to the minimum number of designated tracks which could hold the same, and (e) to pick up or set off cars which are part of the road train consist in more than one yard in consolidated terminals subject to reasonable restrictions concerning the maximum number of such yards.

Such provision should further make it clear that where yard crews are not on duty road crews may be required to perform all of the work enumerated in a, b, c, d, and e above and in addition may be required to handle all switching in connection with their own trains. It should further be made clear that road crews operating in other than through freight or passenger service where yard crews are not on duty may be required to perform any switching or station work.

Provision should further be made that carriers will not arbitrarily transfer switching work to road crews which normally would be performed by yard crews, e.g., trains should not be made up so that switching normally performed at points where yard crews are on duty is required on line of road.

Provision should further be made that road crews are not entitled to any additional compensation other than that contemplated by the basic day, initial and final terminal delay, and conversion rules for the performance of the above services and that no yard crew or hostlers shall have any claim by reason of the road crew engaging in such work.

2. Provision that, where more than one shift of yard assignments is worked and yard service requirements during the period of assignment of a given shift diminish to the extent that less than an average of 4 hours' yard work is required on that shift over a period of 10 consecutive working days, the last remain-

ing assignment on such shift may be abolished. Conversely, when yard service requirements increase to the extent that over a period of 10 consecutive working days an average of more than 4 hours of yard work must be performed within a period of time constituting a normal work shift, the yard assignment shall be reestablished.

Where only one yard assignment remains in a given yard and yard service diminishes to the extent that less than an average of 4 hours' yard work remains to be performed on that assignment over a period of 10 consecutive working days that assignment may be abolished. Conversely, when yard service requirements increase to the extent that an average of 4 hours' yard work is required over a period of 10 consecutive working days within an 8-hour period, the assignment shall be reestablished.

Time spent by road crews in performing the services enumerated in the first paragraph of 1, above, shall not be counted in computing the 4-hour average. Provision should also be made that when yard service assignments are abolished under these conditions yard crews should be considered as "not on duty."

The Organization of Labor Relations and the Handling of Disputes

A Need for Change

Many of the recommendations made in this report will require, if not a total, a fundamental change in the way the industry is organized.

The industry has been delayed in adjusting to a rapidly changing technology and the changes have made the necessary changes more drastic. The industry has the responsibility to make these changes and provide the necessary resources to do so.

It is the responsibility of the industry to make these changes and provide the necessary resources to do so. The industry has the responsibility to make these changes and provide the necessary resources to do so.

Part VI CONCLUDING OBSERVATIONS

The industry has a great tradition of excellence in the quality of its products and services. The industry has a great tradition of excellence in the quality of its products and services. The industry has a great tradition of excellence in the quality of its products and services.

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CHAPTER 13

The Organization of Labor Relations and the Handling of Disputes

The Need for Change

Many of the recommendations made in this report will require, if put in effect, far-reaching and fundamental changes in the operating sector of the railroad industry. The magnitude of the problems and the long-delayed adjustments to a rapidly changing technology and market position have made the necessary changes more drastic. Despite that, the recommendations avoid precipitate change and provide for gradual and orderly adjustments.

It needs to be emphasized, moreover, that the prospects for orderly change in the railroad industry turn very much more on the quality of management organizations and the character of the labor organizations, and the leadership and vision of both, than upon the details of specific programs and recommendations suggested from outside the industry. The industry has a great tradition; it pioneered in modern business organization and collective bargaining in their earliest days. Its work force is comprised of thousands of highly skilled, dedicated, and responsible men who have made railroading their way of life; its managerial and supervisory ranks have been drawn very substantially from men who have come up through the industry and who have the respect of the operating crews.

The Carriers and the labor Organizations should use this occasion for a review of their respective internal organizations and policies; adaptations here may be more significant for the future than any recommendations of this Commission. No one has instructed the Commission to make comments in this area and there are no such issues directly before it, but no one could have spent more than a year in close contact with the organizations on both sides in this industry without responding to the inescapable imperatives of the situation. It is hoped that the parties will not resent these brief observations which are made out of respect for the history of this great industry

and the future need of the American community for a revitalized and vigorous rail transport system.

On the side of management, there is need for considerably greater attention to management development and training. Most railroads have lagged far behind the practices of other large-scale American industry in this respect. In a private enterprise economy, the American community places the major responsibilities appropriately on management to divine the future, to develop and adopt new technology, to search vigorously for new markets and to improve the quality of service to the passenger and the shipper. It is far easier to administer by rule a fixed and unchanging organization than to stimulate and guide an organization to pioneer new developments in a changing world. Despite the considerable progress that has been made by some carriers—and we have come to know that there is more vigor in management organization than we suspected at the outset—we are strongly of the view that a major task needs to be done in the industry in organizational building or rebuilding and management training and development.

There is one other feature of management organization that is of central concern—the way in which the labor relations function is organized within the management of the separate carriers. Far too few first line supervisors, and even those further up the line, exercise authority to settle grievances and disputes. The process takes far too long. The standard procedure on too many properties seems often to be to play it safe and let the claim process itself to Chicago and the First Division of the National Railroad Adjustment Board. While this is a problem for both sides, railroad managements could draw more fruitfully on the diversified experience in American industry generally on ways in which the labor relations function is organized and upon the status and responsibilities of labor relations personnel within the management organization.

On the side of labor, there is equal need for review and reorganization. The existence of five separate operating labor organizations has been a source of a number of serious problems. It has complicated negotiations materially; it has delayed the systematic review of wage differentials and relationships and it has diluted responsibilities and made more difficult the adoption of forward looking policies. The time has come to create by merger one engine service labor organization and one train service organization. In the transition period which the Commission envisages in the years immediately ahead, a major contribution can be made to the operating employees, to the industry, and to the community by the establishment of a single merged engine service and a single merged train service labor organization.

These ideas are not novel or the dreams of outsiders; they articulate what labor leaders among operating employees know to be a necessity. They make explicit what the Engineers and Firemen have talked about for many years, what is the logical conclusion of the Chicago Joint Working Agreement of 1913 and the Cleveland Joint Working Agreement of 1918 and more recent no-raiding agreements, and what committees of these two organizations agreed to do on one occasion within the past 15 years. This view also accords with the current substantial progress made by the Conductors and the Trainmen toward merger. These mergers, resulting in a single engine service organization and a single train service organization, cannot be further postponed. They must be achieved if industrial relations in the industry are to be improved in the best interests of the employees and the community and if the major transformations recommended herein in rules, compensation, and the procedures for settling disputes are to be achieved in the course of the transition period which lies ahead.

But it is not alone management and labor in this industry that need to reexamine their organizations and internal policies. The government machinery touching on the labor relations of operating employees needs no less careful review. The present reference is not to the central need for a coordinated national transportation policy, in the absence of which labor-management relations in this industry can only deteriorate. Rather, it is the concern with the operation of the procedures for administering rules by reference to the First Division of the National Railroad Adjustment Board. While we intend no criticism of any individuals, the present state of affairs can only be described as one of serious disarray. The inordinate time required to handle claims—measured in many years on the average—frustrates any genuine possibility of settling disputes or grievances. The procedures now stimulate claims. The processes of administering rules have become a legalistic game instead of vital industrial relations. The game is expensive to the carriers, to the labor organizations, and to the public. There is no reason for the public to continue to support from public funds neutrals used in deciding cases involving operating employees under the First Division of the National Railroad Adjustment Board. The parties should here bear the same responsibilities they do in industry generally. Yet it is imperative that there be procedures for settling disputes over the application and administration of collective agreements. The parties together with responsible government agencies and officials need to review systematically this area.

It is in the spirit of the above remarks that, in our recommendations and suggestions in earlier chapters of this report, we have outlined

some specific and initial steps toward better labor-management relations. We have suggested that the parties establish continuing joint machinery to ensure that the transition to a new state of affairs in the industry proceeds smoothly and expeditiously. We have recommended the creation of a special tribunal for the handling of disputes arising under the recommended rules, to be financed and administered by the parties themselves. These are but steps towards the kind of meaningful administration of labor relations which only the parties themselves can take. There are many further steps which should be taken, and we have tried to outline some of them in this concluding chapter of our report. These are tasks for the future; but it must be a near and not a distant future.

10/1/20
DISTRICT REPORT OF COVERED BOARD
S. C. PHILLIPS

**STATEMENTS AND DISSENTS
OF ORGANIZATION AND
CARRIER COMMISSIONERS**

DISSENTING REPORT OF COMMISSIONER S. C. PHILLIPS

I wish to record my strong dissent from the report and recommendations of the majority of the Commission. The initial portion hereof expresses my dissent to the report and recommendations of the majority concerning the use of firemen-helpers, including the so-called "protective conditions."

The report of the majority disregards the record made before the Commission and the recommendations made can not be supported by the record. Before taking up the majority report in detail, some general observations are required.

1. Our opposition to the carriers' proposal for the removal of the locomotive fireman in freight and yard service is motivated by the conviction that firemen today perform functions essential to the safe and efficient operations of railroads. It is a conviction strongly shared by the 45,000 railroad employees who work as firemen-helpers. Neither they nor the labor organizations signatory to this report believe in the retention of unneeded personnel. The fact is that the so-called diesel revolution has already taken place and thousands of positions of operating personnel have been eliminated as a result, without opposition from the organizations.

The Carriers have had the full benefits in terms of reduced manpower requirements from the technological changes which have occurred. The record consisting primarily of exhibits introduced by the carriers shows the dramatic reduction which has taken place in the total number of operating employees since the end of World War II and since the changeover from coal burning locomotives to the diesel. In through-freight service for the period from 1944 to 1959, the total employment of firemen decreased from 23,900 to 10,710, the total number of conductors decreased from 15,307 to 8,214, and the number of brakemen decreased from 37,124 to 20,573. In local freight service the reduction in the same period is approximately 25 percent. In yard service the reduction for the period from 1944 to 1959 for firemen was from 21,176 to 18,256, for hostlers—from 8,551 to 4,437, for foremen and helpers—73,861 to 65,184; and for switch-tenders—from 3,192 to 2,007 (CX.8, pp. 14-15). The latest ICC figures show a further drop in employment. At the same time there has been a very sharp increase in productivity of the remaining

workers (Tr. 89, p. 13,844 ff.; Tr. 90, pp. 13,865 ff.; EX. 103 and EX. 103A).

2. The agreement of October 17, 1960, paragraph 4, authorizes the Commission "to use its best efforts, by mediation, to bring about an amicable settlement and agreement between the parties with respect to any issue concerning which the evidence has been heard." The Presidential Executive Order of November 1, 1960, Section 2, authorizes and directs the Commission to assist "in achieving an amicable settlement and agreement with respect to issues in dispute between the parties". The public members of the Commission made little effort to bring the parties together on the issue of the fireman-helper. They have neglected to carry out their mediatory responsibilities.

3. The majority of the Commission has confined its efforts ostensibly to fact-finding and making recommendations. In this role they have completely failed. At the beginning of this proceeding the organizations suggested that no public hearings be had but that instead the Commission make extensive field studies relating to the job content of the fireman-helper. Largely at the insistence of the Carriers, the Commission held extensive public hearings. Accepting the determination of the Commission that the issue should be presented by testimony at open hearings, the organizations left no stone unturned in presenting their case to the Commission. The issue was presented as completely and thoroughly as possible within the resources of the organizations and the time allowed.

There were a number of reasons for the massive presentation by the employees. First, the employees were determined to demonstrate beyond question the complete lack of foundation for the carriers' proposal. Second, the employees were acutely aware of the disadvantage at which they were placed by the long-waged propaganda campaign of the carriers, a campaign unique in the annals of labor-management relations in the United States. Apart from the impact of this attempt at brain-washing by the carriers, the employees regarded it necessary to present a comprehensive and extensive case to restore the morale of the employees so brutally assailed in this campaign. Testimony of more than 50 witnesses, including firemen, engineers, yardmasters, and switchmen was presented. In addition, model locomotives containing electric circuits were used for detailed description of the diesel electric locomotive. More than 1,000 photographs were introduced showing typical situations requiring the presence of the fireman-helper and a large number of exhibits, many of which were manuals, pamphlets and reports prepared by the carriers demonstrating the need for the fireman, and several of which showed statistically the results of extensive study of day to day experiences of firemen.

The majority report calls attention to the importance of the issue and to the fact that the "testimony, argument, and exhibits on the diesel fireman issue consumed more time in the hearings and filled more pages of the record than any other issue before the Commission." (Report, p. 37.) Approximately one-half of the hearing time and the record is devoted to the issue. Notwithstanding these facts, the majority report devotes approximately 15 pages to the issue in a report which runs approximately 186 pages. The result is a crude distortion of the record, a distortion aggravated by the sheer superficiality of presentation. A few illustrations will suffice.

(a) The majority at page 40 evaluates the essentiality of the lookout function entirely on the basis of the safety awards program of the BLF&E. The safety award material was a relatively small part of the organizations' case. The bulk of the testimony on this matter was presented by more than 50 witnesses, practical railroad men with years of experience. No reference is made to this testimony. Instead, the majority engages in the shabby device of averaging the applications for safety awards on a monthly basis among the 16,000 firemen engaged in freight service, to demonstrate their conclusion of the non-essentiality of the lookout function. Indeed, using this approach one could conclude that no one was needed in the cab except the engineer. The majority, for obvious reasons, do not go this far. Instead, they fall back on the alleged presence of the head-brakeman in the cab. Here again the majority proceed on the premise that the head brakeman is always in the cab, a premise unsupported by the record and contradicted by carrier testimony. Most important is the complete shunting aside of testimony concerning the routine preventive aspect of lookout duty, unmarked by heroic action, without which railroad operations would be impossible.

(b) An important aspect of the fireman's role in maintaining motive power arises from the fact that numerous malfunctions of the diesel can be corrected only when the train is moving, requiring the engineer at the controls while the fireman performs his mechanical functions. This conclusion is supported by substantial evidence. In order to reach the conclusion the fireman was unnecessary it was essential to meet this issue. Only one sentence of the report is devoted to this issue—"The Organizations also claimed that the detection of some malfunctions while the train is moving requires two men, in that the engineer has to be at the controls with the train under load, but there were no data to show how frequently such malfunctions occurred." (p. 42) The issue is thus airily disposed of, but in the process the majority blanks out an important and substantial part of the record, including detailed and extensive testimony by many witnesses as to the nature and frequency of such malfunctions, documents issued by

carriers and distributed to firemen showing ~~two~~ *are* needed to detect and correct malfunctions, and the significant fact that the carriers did not challenge the organizations' testimony on this ~~issue~~. The fact that statistical data as to frequency were not introduced does not justify the conclusion that such malfunctions are infrequent. More important, it does not warrant obliterating an entire area of vital and pertinent facts.

(c) In evaluating the safety aspect of the fireman's mechanical duties, at page 43, the majority again make shoddy use of the BLF&R safety award applications. By this method they equate the fireman's contribution to safety by dividing 12 applications involving malfunctions over a 43-month period. From this base they conclude "the problem is infrequent and therefore the fireman does not make an essential contribution to safety in connection with mechanical functions". It may be tempting to a report writer, out to establish that the fireman is not necessary, to dispose of an important aspect of the fireman's function by such a simple mathematical approach, but it hardly comports with the role which the majority commission described for itself in the forefront of its report. For in the process two shocking wrongs are committed. First, the facts are perverted. Second, the basis of decision excludes a paramount consideration. As to the first, the majority was fully informed as to the nature of the safety award program, and that at best it could elicit information of an illustrative character involving near accidents or accidents. It was never intended and could never serve as a statistical index of the preventive function of lookout. If numbers are significant, the thousands of malfunctions shown in both the carrier and organization surveys should govern the evaluation. And this brings us to the second wrong. Completely overlooked in the discussion is the qualitative aspect. The importance of this aspect was recognized by the Chairman of the Commission during the hearings when the surveys were presented as follows:

I think in these circumstances the job description is much more important than the time study. The extreme parallel, for example, would be of a watchman who would be required every hour to punch a timeclock, but only once in a month would find a fire, and once in six months thwart a robbery. But the absence of the watchman, apart from the elevator operator or the janitor, who are both also perhaps necessary in the building, would be catastrophe at the time when he is really qualitatively needed. That is the extreme. Of course, my function is not to interpret what has been put before the Board, but I believe qualitatively the hazard of accident, both from the standpoint of personal safety and also from the property damage is so great that *there ought not to be any risks taken with respect to having available a man who can make these repairs, correct these malfunctions, large, many, or few, at the time they happen.* That, I should say, is the qualitative aspect. (Tr. 56, pp. 8120-8121.) (Emphasis added.)

(d) As a substitute for the fireman in yard service the majority, at page 39, recommends the use of mirrors, radios, and dual controls. Considerable evidence was introduced to show the unreliability of these devices. For example, the record includes operating rules of certain carriers forbidding the use of mirrors and radios in switching operations. The report is devoid of any reference to this testimony. It is as though the majority had generated the suggestion, that it had not been the subject of testimony, and that the suggested devices were noncontroversial.

An examination of the majority report leads to the conclusion that it is not based on the record but rather on a proposed digest which was submitted to the members of the Commission under date of December 5, 1961, by the staff of the Commission for comment. Comments were submitted by the labor members of the Commission pointing out numerous errors of fact, important omissions and distortions of the record. It is apparent that the members of the Commission who have joined in the majority report have relied on this uncorrected digest and there is a real question in the minds of the minority whether the members of the Commission took the opportunity to read the comments on the digest submitted by the labor members.

4. The standards of decision in this case are not presently in dispute.

The carriers' opening statement and presentation in chief proceeded on the simple proposition that there was only one standard of decision applicable in this case and that was whether there were job duties for the firemen to perform. Following the line taken in their propaganda campaign, the carriers' presentation was devoted to demonstrating that the fireman had nothing to do. Obviously, if the fireman had nothing to do and there was no job for him, the job should be eliminated. The employees' presentation in response to the carriers demonstrated the obvious. Witness after witness testified in detail as to the great variety of vital and important job functions of the firemen. As will be shown below, the presentation included not merely the testimony of employees but supporting information drawn from numerous exhibits written by the carriers. The sincerity and obvious veracity of the employees' testimony was such that the carriers no longer could, with straight faces, maintain this position. The rebuttal case of the carriers abandoned the featherbed concept. There indeed is work to be done and the new approach of the carriers was that the work could be done by others.

From the outset of this case the employees suggested two governing standards which should guide the determination in this matter: first, whether the removal of the fireman and the transfer of his duties to others would be consistent with safety for the public and the em-

ployees; second, would such action impair the efficiency of railroads to such an extent as to give rise to public concern. These standards have been accepted by the majority (p. 37). A third governing standard should be added in view of the "new look" to the carriers' case and the position of the majority expressed as to the crew consist issue (p. 58) discussed later, and that is—whether removal of the fireman will render the work to be performed by the remainder of the crew too burdensome or onerous.

5. The majority has disregarded their basic obligation to be guided by the record and by the appropriate standards of decision. This is apparent in a number of ways. First, as we have pointed out, in the blatant disregard and distortion of the record. Second, in the statement of the issue. At page 37 the majority states: "The basic question involved in this issue is whether the fireman-helper's job is so essential for the safe and efficient operation of diesels in road freight and yard operations as to require a national rule on the subject." This is indeed a strange statement of the question. The issue is not whether for the first time in railroad practice there should be a national rule. The fact is there has been a national rule on this subject for 25 years. The question is whether the carriers have made out a case for changing a long established rule. Why was the shoe put on the fireman's foot?

Third, by the contrast in the manner in which the other manpower issue was considered by the majority. Their approach to the crew consist issue is inconsistent with the handling of the fireman's issue. At page 56, discussing the duties of the ground crew, the majority states: "There is, however, some basis for the view of the organizations that 'job content' has tended to increase because of such factors as increased length of freight trains and attendant increases in responsibilities." Considerable evidence of this character was introduced by the organizations on the fireman's issue, including statistical data as to the sharp increase in the number of diesel units used in locomotive consists, and evidence of witnesses that as many as 12 diesel units have been used on occasion. No weight is given to this data, but even more important in betraying bias there is not the slightest reference to the data in the report, and, of course, no discussion of the impact of longer trains and more diesel units on the duties and responsibilities of the fireman.

The majority suggest an additional standard of decision as to the resolution of the crew consist issue which was not discussed or applied in the fireman's issue. At page 58 it is stated that a relevant criterion is "whether the proposed crew consist will impose an unduly burdensome workload on the members of the crew, or is necessary in

order to avoid such a workload". The impact of the removal of the fireman on the workload of the engineer is completely ignored.

At page 58, the majority states:

In this industry, whatever may be said of others, the employees have a legitimate collective bargaining interest in the matter of crew consist, and it is our view that the collective bargaining process should remain the basic method for resolving disputes concerning this matter.

The size of the ground crew is expressly referred back to the parties for negotiation at the local level. Is there any basis for drawing a distinction in this report as to the size of the crew in the cab?

The following discussion based on the record in this case, demonstrates conclusively that the removal of firemen will lead to unsafe and inefficient railroad operations and will cast an undue burden on remaining rail employees.

I. The Fireman Is Necessary To Maintain Lookout

The majority included under the caption "The Lookout Function" discussion both of lookout and signal passing. As signal passing is an important function of the fireman, we shall discuss it separately, after first considering lookout as such.

The majority's review of the lookout function fails to state the most significant underlying fact: the engineer's view with isolated exception is restricted to his own side (the "right side") of the train. Hence the imperative need for a lookout on the fireman's (or "left") side of the engine. It is disregard of this consideration which vitiates the majority's argument on the lookout function.

On most locomotives the cab is in the center or some distance from the front. This means that when the engine is pulling cars, the hood of the engine substantially limits the engineer's vision to the area on his right and to the tracks substantially ahead of the locomotive. The engineer has no view whatever as to what is happening on the left side of the locomotive. When cars are being pushed, the engineer cannot see anything which is transpiring on the left side of the locomotive or even well ahead of the train because the cars cut off his view (e.g., EX. 29, p. 73; Tr. 60, pp. 8782-3).

A. Road Service

The fireman in road service has essential lookout functions. He alone is able to see what is transpiring on the left side of the train. When the engineer is looking forward or backward, the fireman is looking in the opposite direction to see what obstacles, if any, are in the path of the train. Thus the fireman must look for pedestrian and vehicular traffic at or approaching grade crossings, signal indications, conditions of the right of way, obstructions on the track, ground men,

including repair crews, as well as unauthorized persons and children playing along the tracks. He must also look back at this own train for hotboxes, dragging equipment, shifting or protruding lading and open or swinging doors (e.g., EXs. 3 and 94, pp. 2-3; EX. 29, pp. 5-6, 132; Tr. 50, pp. 7213, 7217-19; and for carrier concurrence see EX. 109, p. 70).

Road freight service generally involves switching of cars to set out and pick up cars at sidings and transfer points en route and also to set off defective cars and equipment. The head end brakeman is on the ground for frequent intervals and hence the fireman is the only man available to perform the lookout function on the left side of the train. (See for example, CX. 153, p. 24, Tr. 53, pp. 7731-3; Tr. 50, pp. 7218-19; Tr. 52, pp. 7515-25; EX. 29, pp. 5-6, 68, 115; EX. 30, pp. 11, 30, 57 and 68; EX. 117, p. 6.) It is at such times that a lookout on the left side of the engine is most crucial. This fact the majority overlooks completely. Such switching operations generally require a number of back and forth movements. If there were no fireman in the cab these movements would be performed without any lookout whatever on the left side of the engine. Frequently these switching movements are conducted in heavily populated areas with the train working back and forth across public highways used by both pedestrians and motor vehicle traffic (see, e.g., EX. 29, p. 5; EX. 30, pp. 13, 57, 83; Tr. 53, pp. 7729-32). All too often pedestrians and motor vehicle drivers are heedless of the dangers of railroad crossings and if it were not for the vigilant care on the part of the engine personnel the danger of injury and death to the public would rise sharply. The record accordingly refutes the majority's contention that the fireman is nonessential because the head end brakeman is always available in the lead unit to maintain a lookout. Moreover, many of the carriers' own rules and practices require the head end brakeman to ride in the rear or trailing unit of the locomotive consist in order for him to perform best his particular duties, namely, maintaining a backward lookout at the train for defective equipment, hotboxes, dragging equipment, defective or dragging brakes (see, e.g., Tr. 50, p. 7218; Tr. 51, pp. 7407-8).

The effect of the diesel revolution has been to increase rather than to reduce the need for lookout and all three men—engineer, fireman, and head brakeman—are necessary in road service to maintain the important duty of lookout. Modern freight trains generally are much longer and carry much greater tonnage than they did a few years ago. Heavier motive power is needed and the makeup of the locomotive consist has a substantial number of diesel units. Under these circumstances, it is necessary for the fireman to devote a substantial part of his time in making periodic inspections and in detecting and correct-

ing malfunctions of the diesel units. This work necessarily takes him out of the lead cab a substantial part of the time. This too is overlooked by the majority. During his absence the engineer must rely upon the head end brakeman for the left side lookout (e.g., Tr. 53, p. 7733; EX. 29, p. 6; Tr. 57, p. 8257).

Of special interest is the following statement by a carrier official:

An engineman (fireman and engineer) is not only the lookout man for his own train but can serve his company well by noting the irregularities or equipment failures all along the railroad. His keen observation of the company's properties as he moves over the line has frequently resulted in reports being transmitted and prompt action taken and resulted in great savings to his company. Such observations often reveal hotboxes, shifted lading, fires, track and bridge irregularities, livestock on the track or any other abnormal condition that requires prompt attention. (EX. 100, p. 70.)

The record shows that firemen do in fact prevent and minimize accidents by maintaining a lookout on the left side of the train (e.g., EX. 29, p. 81; EXs. 53C, 53D; Tr. 53, pp. 7737-9). Even with present manning requirements accidents occur. As a Nation we cannot tolerate the increase in accidents which would certainly come about if the fireman is removed.

We have previously adverted to the fact that the majority, to minimize the lookout function, misuses in shocking fashion the BLF&E Safety Awards program instituted in 1957. We believe the facts justify this strong statement. The BLF&E introduced before the Commission 439 safety award applications (EXs. 53A, 53B, 53C, 53D and 53E). These applications came from locomotive firemen and others on their behalf reporting accidents or near accidents in which firemen played a key role in either preventing the accidents or minimizing the extent of injuries or damage in those that could not be prevented. These applications covered incidents in both road and yard service. The majority states that in a 43-month period there were 138 applications for awards in freight (i.e., road) service. Then they point out this is "an average of a little over 3 such applications per month among an average of 16,000 freight firemen on duty."

The majority thus sets up a strawman which it proceeds to demolish. They imply, elliptically, that the organizations relied principally on the volume of safety award applications as proof of the need for the firemen. They speak as if *every* act of a fireman which resulted in avoidance of or minimizing injury to persons or property was the subject of a safety award application. The argument then continues that since there was an average of but 3 applications per month among 16,000 employees, only 3 accidents per month were averted or minimized. This number they claim does not justify retention of 16,000 employees.

The fact is, of course, that the organizations never advanced an argument so preposterous or which lent itself so readily to deflation by the majority. (a) Major emphasis was not placed on the safety award program. (b) The safety award program was presented, not as proof regarding day to day operations, but as illustrations of dramatic incidents which served to highlight the routine tasks of the fireman respecting lookout. It is the essence of such a program that it calls attention to the unusual situation which demanded great presence of mind, skill, or daring. No application is filed where one simply does his job each day. As pointed out by the organization when the safety award applications were introduced, the important aspect of the lookout function is its preventive character, which is not susceptible to statistical measurement. The majority admits this in another section of the report. "This is an area not subject to statistical evaluation," the majority said (p. 57) when it discussed accidents averted through employment of a full train crew. These facts are so obvious that it should be unnecessary to state them. Yet the majority has misinterpreted this program and used this misinterpretation to justify its conclusion. (c) The majority further denigrate the award program by saying: "It is difficult to say what would have happened in the cases cited if there had been no fireman on the left side." The fact is that it was the fireman who did spot the emergency or took the action which prevented or lessened an accident. While the majority may find it "difficult to say" what would have happened but for the fireman, we do not: there would have been an accident, or a more serious accident. The carriers recognize these facts as evidenced by their issuing letters of commendation in many of these cases. (See, e.g., EX. 53D, pp. 221, 233, 233e, and 349).

Finally, the majority contend that "another member of the crew either occupied or could have occupied a lookout post on the left side of the cab." The only other member of the crew available is, of course, the head end brakeman. But what of the situation where the head end brakeman is on the ground? This is exactly what happened in application No. 189 (EX. 53D, pp. 357-359). There, while the head end brakeman was on the ground another member of the crew, not visible to the engineer, was on the tracks in the path of train but not visible to the engineer because of the curvature of the track. The fireman, however, was able to see this man from his side and called to the engineer to stop. But for this action, this crew member would have been killed or injured.

B. Yard Service

The lookout duty of the fireman in yard service is essential to safety.

The record shows, but the majority overlooks, the variety and complexity of yards and industrial areas throughout the United States. Typically, they consist of numerous curved tracks, switches, viaducts, bridges, overhead wires, third rails, and buildings as well as heavily traveled grade crossings. Close clearances are common. Many different operations are performed, including classification of cars, hump operations and float yard operations. Yard operations are carried on round the clock in all kinds of weather, fog, rain, snow and sleet. There is constant movement, not only of engines and other railroad equipment, but also of human beings, including fellow rail and non-rail employees, children and trespassers. (e.g., Tr. 50, pp. 7213-15, 7222-97; Tr. 51, pp. 7383-7402; EX. 29, pp. 2-5, 58-62, 86-91, 94; Tr. 60, pp. 8782-3; Tr. 59, pp. 8643-8719.) The fireman has the important, indeed vital duty on the left side of looking out for: (1) vehicles and pedestrians at all crossings; (2) railway cars or other engines; (3) other employees such as laborers, inspectors, car repairmen, and personnel working on or about the tracks; (4) unauthorized adults or children about the tracks, on or under cars; (5) members of his own crew to be sure they are all in the clear before a movement is begun; (6) cars being handled by the locomotive to spot hotboxes, dragging equipment, shifting or protruding lading, open doors, end gates that are down and cars being handled by other crews for the same defects; (7) miscellaneous equipment, such as hand cars, motor cars, cranes, tool and supply cars that may be working in the vicinity; (8) cars "running out" because of the grade of the yard, high winds or faulty hand brakes; (9) obstructions such as ties, trees, rails, debris, and other rubbish on the tracks and into the switchpoints; (10) employees of industrial plants being served and their equipment such as hand trucks; and (11) whether clearance is sufficient to move cars both in industrial plants and in the yards (EX. 3, pp. 6-7; Tr. 51-65; EXs. 29, 30, 97, 117, and photos: EXs. 6, 7, 12, 19-23, 25, 31-9, 42-49, 99).

In addition to the physical fact that the engineer cannot see what is transpiring on the opposite side of the locomotive, it is also a physical fact that he cannot look in two directions at the same time. Yard engines work in reverse as much as they work in forward movements. When, for example, the engineer is looking for a signal from the trainman while the train is moving in reverse, the fireman is looking in the opposite direction, that is the direction in which the train is moving to keep the lookout which the engineer cannot maintain since he is looking in the opposite direction for signals from the crew (see, e.g., EX. 30, p. 38).

The number of railroad employees and other persons killed and injured on railroad property makes imperative a left side lookout.

Its removal would cause the accident rate of railroad operations to skyrocket. This conclusion is supported by the many incidents related by the firemen, enginemen, and other employee witnesses describing how serious accidents, personal injury and property damage were avoided by the lookout maintained by the fireman (e.g., EX. 29, pp. 80-1, 87-8, 94-95, 128-9; EXs. 53A, 53B; Tr. 50, pp. 7214-15).

The majority brushes aside the lookout duties of the fireman with remarks which answer nothing. Thus they say that in yard movements "the engineer is required to proceed slowly enough to stop short of any obstruction or opposing train movements, and to move the locomotive only if he has a signal from the ground crew." So he is. What this comment overlooks is that *while he is going slowly enough to stop, he will not stop for an obstruction or opposing movement he cannot see.* It is the fireman's duty to see the dangers and to relay them to the engineer. A ground crew member on the left ordinarily will be unable to signal the engineer, and in the exceptional case where he can do so, only via another crew member. What benefit is it to have the train moving slowly and the danger apparent to a crew member, if the warning cannot be relayed to the engineer?

Further, the majority says that the engineer proceeds only on signals from the ground crew. This too is true. But if the ground crew are all working on the right side (and in the absence of a fireman they will have to stay predominantly on the right) what member of the ground crew will see what is happening on the left? In this situation the entire left hand side of the train remains unprotected.

Regarding lookout in yard service the majority makes the same attack as in road service on the BLF&E Safety Award program. All that we have said above on the subject applies here. We add only that in yard service only the fireman is available to maintain a watch on the left. Further, while yard operations are slow, and the engineer proceeds only on signal, it remains a fact that the engineer cannot stop for an obstruction or hazard he is not aware of. Moreover, a member of the ground crew or of the public can be maimed or killed as effectively with an engine moving 2 miles an hour as at 10 miles an hour.

Finally, the majority concludes that in any event there was experience with one-man diesel operations prior to the 1937 diesel agreement. But as the majority says, this accounted for only 2 percent of total yard operations on class I railroads in 1937. More significantly, the majority fails to make any claim that such operations were safe or efficient. Absent such claim, the fact of operations, per se, is of no consequence.

The record demonstrates that the fireman both in road freight and yard service has substantial job content with respect to maintaining a

lookout and that this lookout function plays a vital role in the safe and efficient day-to-day operations of the railroads.

II. The Fireman Is Needed To Pass Signals in Yard and Road Service

We turn now to consider signal passing.

The majority brushes aside the contentions of the fireman that the fireman is needed for signal passing both in yard and road work. They say the evidence is conflicting, but conclude that "there appear to be very few occasions when signals must be passed on the left side from the ground crew and relayed to the engineer. In the vast majority of cases, one or more members of the ground crew can position themselves on the engineer's side and pass signals directly to him."

The record is diametrically to the contrary.

Because of the physical characteristics of railroad equipment and property, it is essential that hand signals be passed from time to time to the fireman in the switching and setting out and picking up of cars, and making up and breaking up of trains both in yard and road service. By means of oral and written testimony and more than 1,000 photographs and slides and several movie presentations, the employees showed the varied situations in the yards and industrial areas throughout the United States in which hand signals are passed on the fireman's side (Tr. 51-62, passim; EXs. 29, 30, 6, 7, 12, 19-23, 25, 31-39, 42-49, 97, 99). Because of physical conditions such as track curvature, close clearances, adjacent track congestion, overhead and side obstructions, signals are, of necessity, passed on the fireman's side.

Although the carriers attempted to minimize the importance of signal passing, *their survey* showed that in fact this is a substantial and important function. Thus a carrier survey showed that in 794 trips in which so-called miscellaneous duties were performed by firemen, the fireman relayed hand signals on 2,633 occasions and the time spent in relaying such signals involved 271 hours and 55 minutes of a total 323 hours and 28 minutes given to the performance of all miscellaneous services (CX. 13, p. 9). Likewise in freight operations the carriers' combined survey showed that firemen relayed hand signals on 2,432 occasions and it took 295 hours and 21 minutes to do this work (CX. 13, p. 9).

What the employees stress and what the majority overlooks is the fact that signals are frequently given on the fireman's side for important and compelling reasons. Numerous employee witnesses, including yardmasters, switchmen, and enginemen testified that signals are passed on the fireman's side, not only because it is frequently impossible to do it otherwise, but, because it is the safest and most efficient way of carrying out their work. One yardmaster put it this way:

"As a general practice switchmen will do their work on whatever side is the safest for them and the most efficient. Ordinarily, the safest method of switching is to pass hand signals directly to the engineer and whenever possible, this is the way switching is carried out. However, one thing you can be sure of is that when the switchmen are working on the fireman's side it is only because that is the safest side to work on (Tr. 62, pp. 9286-7)." Numerous other witnesses testified that when signals are in fact passed on the fireman's side it is because it is not only safer to do it this way but also because it is more efficient (e.g., Tr. 52, p. 7499; EX. 97, p. 68; EX. 117, p. 5). In addition, of course, many of the situations described by the employee witnesses make it mandatory that signals be passed on the fireman's side because the physical conditions of the track and railroad equipment make it impossible for signals to be observed by the engineer on the right side (e.g., Tr. 50, pp. 7250-1, 7267-8; Tr. 51, pp. 7393, 7433; Tr. 52, pp. 7488-90; Tr. 60, p. 8840).

Even the carriers grudgingly have admitted that there are situations in which it is physically impossible to pass signals directly to the engineer (CX. 138, pp. 28, 36; EX. 117, pp. 84, 86). They have suggested, however, and the majority accepts the contention that other means of relaying signals could be employed, such as mirrors, radios, and dual controls. The record shows that mirrors and radios are unsafe and unreliable and in many instances their use as communicating devices to relay signals are expressly prohibited by the rules and regulations of the carriers (Tr. 51, pp. 7398-7400; EX. 29, pp. 8, 9; EX. 30, pp. 17-18, 25, 88). What of dual control locomotives? The record shows that dual controls would greatly delay the operation because of the necessity of changing operating brake controls from one side of the engine to the other and the necessity for making brake tests with each change (Tr. 50, p. 7219; Tr. 51, p. 7395). Where dual controls have been tried in the past they have been abandoned (Tr. 51, pp. 7394-6). Moreover, dual controls would be unsafe because one side of the locomotive would still be left unprotected by lookout (Tr. 50, p. 7219; EX. 30, pp. 86-88).

With respect to road service, the carriers' survey shows that the fireman spends an important part of his time in relaying signals to the engineer, but the majority does not even mention the signal passing function in road work. Signals are passed on the fireman's side in road service for the same reasons they are passed on the fireman's side in yard service. It is safer, more efficient and may be the only way possible to work because of physical conditions such as track curvature, bridges, viaducts, other obstructions, close clearances and a whole host of reasons set out by the employees (e.g., Tr. 50, pp.

7215-7219; EX. 30, p. 13). In addition, there is of course no duplication of services here because whether freight service be classified as "through freight" or "local freight" there are many occasions when the head brakeman must be and is on the ground to perform his duties and at such times signals may have to be passed on the fireman's side. (See, e.g., EX. 29, p. 132; EX. 30, pp. 12, 13, 83, 91.)

The fact is that today as in the past, signals are passed to the fireman because it is safer to do so, or because operations are carried on more expeditiously in this manner, or because there may be no other way signals can be passed. If the fireman were removed from yard and road service signals could not be passed as safely or as efficiently and in many cases, not at all. There is nothing in the record to support a contrary conclusion.

Operations without firemen, the majority says, is not hypothetical because private firms, the Armed Forces, and switching and terminal companies overwhelmingly operate safely and efficiently without firemen. The majority concedes that such operations possibly are not wholly comparable to regular yard work, yet relies on these operations to support its conclusions.

This reliance is wholly misplaced. Industrial operations are not comparable in any material respect to road freight and yard operations. They are characterized by movement within a restricted and highly protected area. In general, the engines do not leave the plant grounds. Thus the general public is not exposed. Speeds tend to be very slow. The number of cars handled at a time is few. The total number of cars handled per shift is few. The range of movement often is very restricted, even to a distance of a few hundred feet. Moreover, and this is significant, frequently one-man operations are one man in name only, since a ground crew member customarily rides in the cab, performing the firemen's duties. We find confirmation of these facts not only in the organizations' testimony, discussed below, but in the carriers' exhibits.

From Carriers' Exhibit 47 (p. 2) it is clear that the larger plants in general use firemen and by and large it is only the smaller ones which do not. The one-man operations average two locomotives per facility, the two-man operations average nearly five locomotives per facility. The one-man plants average about 15 miles of track, the two-man, nearly 40 miles of track. The one-man factories average about 16 shifts per week, the two-man, over 42 shifts. Thus, it is apparent that as industrial operations begin to approach that of a common carrier in scope, firemen are generally used. Observe also that the great bulk of one-man operations have only one locomotive in service (CX. 47, p. 18 et seq.) and that one engine usually is of low horsepower.

Let us turn now to the operations themselves. Because of difficulties of access to plants, etc., clearly it was impossible for the organizations to analyze in detail every situation presented by the carriers. They did present evidence regarding the United States Steel plants served by the Union Railroad of Pittsburgh, a U.S. Steel subsidiary. Mr. B. Ralph Gould of that line made the presentation generally on one-man operations on behalf of the carriers. What are the facts regarding one-man operations at U.S. Steel in Pittsburgh? Mr. William F. McCabe, General Chairman on the Union, testified as to the exact nature of the work at these plants. At the Duquesne plant there is a one-man engine which pulls 8 or 10 cars a distance of 600 feet to be dumped. While only one man is on the engine, there are two or three ground men for this simple operation (Tr. 58, p. 8552). Indeed, the use of an engine for this operation is new. Until recently, the movement was so limited in actual feet covered, a "mule" was employed (Tr. 58, p. 8555). General yard work at Duquesne is done by full crew Union Railroad employees (Tr. 58, p. 8554). The number of cars handled per day by the industrial engine is far less than the number handled by Union crews (Tr. 58, pp. 8552, 8554).

At Homestead, the movement is about $\frac{1}{2}$ to $\frac{3}{4}$ mile. Special cars feed raw materials and remove ingots. On 1 day, which was an average day, four engines moved only 43 cars, and then on half of the movements there were two men in the cab (Tr. 58, p. 8562).

At the Edgar Thompson plant, until lately, ladles were moved a short distance by a one-man industrial engine. About 50 to 80 ladles per day were handled, but a second industrial engine for spotting empty ladles had two men in the cab (Tr. 59, p. 8576). When we compare these operations with true railroad operations, generally on the Union Railroad (Tr. 58, p. 8421, et seq.) we see vanish the supposed similarity between true railroad operation and industrial switching.

III. The Fireman Is Necessary To Maintain and Restore Locomotive Power

The record shows beyond doubt that one vital job function of the fireman is to keep diesel-electric and straight-electric locomotives running so as to get trains over the road. This duty was referred to variously, as maintaining and restoring locomotive power, or detecting and correcting malfunctions, or simply mechanical and electrical duties.

The majority report says (p. 40) :

An evaluation of the importance of this function must be considered in the light of the Organization's contention that the diesel is a 'complex and intricate, troublesome mechanism, prone to malfunction and needful of constant attention.' While few doubt that it is a 'complex and intricate' piece of

machinery, the relevant questions are whether it is generally 'prone to malfunction', and if so, whether the fireman-helper has an essential or necessary function in this regard.

It then discusses various considerations they deem relevant.

A. The Record Shows Contrary To The Majority's Assumption That Malfunctions Are A Constant Problem.

Carrier witnesses argued that diesel-electric and straight-electric locomotives were relatively simple machines, practically trouble-free, and of such a nature that if malfunctions occurred enroute, nothing need be done by the fireman because of the built-in automatic devices and alarm systems, and that such work that might have to be done could be done by the engineer alone (e.g., CX. 13, Tr. 6, pp. 1061, 1067-8, 1074; Tr. 7, p. 1169 and Tr. 28, p. 3996).

The majority report's assertion (p. 40) that "few doubt that it (the diesel) is a 'complex and intricate' piece of machinery" is diametrically opposed to what the carriers sought to have the commission believe. The majority, while thus recognizing that the carriers were wrong about the claim of diesel simplicity have upheld their claim that diesels are practically trouble-free and that when malfunctions do occur the fireman is still unnecessary. But the record against these latter contentions is also overwhelming.

The employees commenced their presentation with a detailed description of the diesel-electric locomotive by means of model locomotives containing electrical circuits, photographs, slides, and a flock board. Employees whose qualifications to speak on the subject were unchallenged, visually and orally demonstrated the truly complex and troublesome nature of the diesel engine, that it was prone to malfunctions of all sorts, and that the fireman was essential to keep the units running or to shut down one or more of the units to avoid expensive repairs and possible accidents and derailments (Tr. 45-50, and EX. 4 and 5).

The testimony of these witnesses was supported and corroborated by more than fifty firemen and engineers who testified either in person or by written statements. These enginemen testified from their own personal knowledge and railroad experience concerning the need for firemen to detect and correct malfunctions. (See, e.g., the following: Tr. 51, pp. 7297-7305; Tr. 53, pp. 7682-86; Tr. 54, pp. 7748-89; Tr. 57, pp. 8253-68; Tr. 60, pp. 8917-21; EX. 29, pp. 6-8, 63; EX. 30, pp. 41-43, 84-6; and with respect to straight-electrics, see EX. 94, EX. 95, preface, pp. 1-12, 17-32, 38-41 and 45-74.) This testimony showed first, that various malfunctions occurred with frequency and that their correction was a regular duty, not an isolated phenomenon; and, second, the need of the fireman to detect and correct these malfunctions.

Documentary evidence showing the type, nature, and frequency of malfunctions was also submitted. The number and types of malfunctions occurring on various railroads was put into the record by means of several surveys conducted by the BLF&E, the results of which were summed up in Employees' Exhibit 28. Thus, for example, the survey of 21 railroads conducted during July and August 1961 showed 6,301 total alarms and 3,529 total malfunctions without alarms. The nature and extent of malfunctions on various carriers was also indicated by the written work reports submitted to the carriers on the ICC forms. (See, for example, EX. 28, pp. 6 and 7, and Tr. 62, p. 9420.)

Conclusive evidence that malfunctions are frequent and require attention of firemen-helpers appears in numerous documents issued or prepared by the carriers showing the nature and type malfunctions that occur on the diesel locomotive and what the fireman is expected and required to do to detect and correct such malfunctions. These documents include bulletins, operating and other manuals, troubleshooting books, and promotional examination material.¹ Many of these instruction books, bulletins, and manuals are exceedingly elaborate and indicate that the carriers require a vast amount of detailed knowledge by the fireman. The bulk of this documentary evidence is collected or discussed by various witnesses at the following record references: EX. 10 and 11; Tr. 54, pp. 7756-78; EX. 24; EX. 26; EX. 29, pp. 7, 13-47, 56-58, 101-112 and 133; EX. 30, pp. 11, 13-14, 16, 45-46, 50-51 and 77-80; EX. 40, 41, 50 and 51 and EX. 95, pp. 1-9 and 17-26.

Because these carrier documents constitute an admission against interests in this proceeding, some discussion in depth is warranted here. The Baltimore and Ohio blue book on diesel electric locomotives (EX. 10) includes the following in the general notice and preface:

General Notice

This book is issued to firemen and engineers for their information for the purpose of building up their efficiency, in order that they may become competent locomotive engineers and firemen. It is, therefore, desirable that they devote a portion of their time to the study of the questions contained herein. . . .

Preface

In order to improve the efficiency of our firemen and engineers on Diesel Electric locomotives, this booklet has been prepared.

There are generally preferred methods of procedure in cases of breakdowns and mishaps with which the firemen and engineers should be familiar. . . .

¹ In addition, many documents were not available in sufficient quantity to produce for the Commission as exhibits and accordingly single copies were deposited with the Commission. These latter documents were listed by the staff of the Commission in the document entitled "Materials Introduced by the Parties—Not Identified as Exhibits" consisting of eight pages, dated October 26, 1961.

... The engineer and fireman must work together in harmony, each recognizing his dependence upon the other if best results are to be obtained.

The B & O book also describes how malfunctions are to be corrected without tools or by means of crude tools such as flagsticks, knives and similar tools (EX. 10, pp. 29, 66, 81, 108, 105, 106, 107, 125, 137, 140, 144, 145, 153 and 167).

Illustrative of the instructions given is the following:

The unit causing the wheel slip relay to operate, will be unloaded, take that engine off the line and examine the traction motor contactors and the position of the reverser in the electric cabinet. If it is found that a contactor is closed with the engine off the line, pry it open with a dry flagstick. If it is found that the reverser is in the wrong position, again stop the train before changing the position of the reverser. If nothing can be found wrong, leave the affected unit off the line and keep a close check for sliding wheels as the wheel slip relay will not longer operate. (Ex. 10, p. 137.)

Note also the answer to question 99 on page 140:

No alarm is given when a traction motor blower falls other than the smoke or fire coming from the affected motor * * *.

One can turn to almost any page in the book and find that the carrier expects malfunctions of various kinds and expects that the fireman will correct them or shut down the unit and keep it off the line to avert serious damage or other adverse consequences.

The B & O also furnishes its firemen and enginemen with trouble-shooting cards for various types of locomotive power which the men carry with them in their pockets. These cards describe various malfunctions, what to look for and how to correct them. (Samples of these are reproduced in EX. 11, at pp. 2-44.) These trouble-shooting cards also show that the firemen are expected to correct various malfunctions with such devices as a knife, key, nail file, flagstick, fusee cap and pieces of cardboard. (See EX. 11, pp. 5, 14, 20, 24 and 26.)

These trouble-shooting cards also show that many malfunctions cannot be detected or corrected except by a two-man engine crew. These are malfunctions which can be detected and corrected only when the engine is under load (power) and the train is in motion. With respect to such malfunctions, one man must remain at the controls to keep the engine in operation and the second man—the fireman (helper)—must inspect the lead and trailing units to find the malfunction. Thus, for example, card 5A at page 23 of Employees' Exhibit 11 provides:

Most partial loads are because the equipment failed to make transition. If so, try shoving in on manual layshaft lever to slightly increase engine speed. Do not hold lever in as the overspeed will trip. If this does not help, have engineer notch off to the fifth notch and with a spare 150A fuse short across fourth terminal stud on left side of P.R. relay * * *.

For other record references establishing the great number of malfunctions which require two men to detect or correct, see e.g., EX. 4, pp. 139-143; Tr. 46, pp. 6688-90; Tr. 47, pp. 6714, 6728; Tr. 48, pp. 6838-9; Tr. 54, pp. 7751, 7756-58 and EX. 10, preface, pp. 137, 140; EX. 11, pp. 51, 57; EX. 30, pp. 16, 80, 89; Ex. 51; Ex. 95, pp. 10, 27, 28.

The majority report completely fails to discuss this type of malfunction except to say (p. 42) there were "no data to show how frequently such malfunctions occurred". Yet almost every employee witness testified as to this type of malfunction (see Tr. 45-61, Exs. 29, 30, 35) and the carriers' own documents bore them out. The carriers didn't challenge the fact that there are many malfunctions which require two men to detect and correct and certainly this record does not show such malfunctions are infrequent.

Some of the bulletins issued to the engine crews by the B & O railroad are reproduced in EX. 11, pp. 49 to 88 inclusive, and include bulletins promulgated since the proposed rule change by the carrier. The importance of these bulletins and the high duty imposed by them on the firemen is typified by two of the bulletins appearing at pages 51 and 57 of Employees' Exhibit 11. These bulletins provide in effect for the fireman to isolate a defective traction motor, but point out that in the majority of locomotives, when one of the traction motors is cut out, the wheel slip indication is nullified. This is important not only for the reason mentioned in the bulletin, to-wit, that wheel slippage can cause flash-over damage on the remaining motors of the unit, but also because wheel sliding which remains undetected for an unreasonable period of time will cause a false flange on the wheel and can readily cause a derailment and serious damage and personal injury.

The preface to the B & O blue book, (EX. 10) quoted above, particularly the phrases, "There are generally preferred methods of procedure in cases of breakdowns and mishaps with which the fireman and engineer should be familiar" and that "the engineer and the fireman must work together in harmony, *each recognizing his dependence on the other* if best results are to be obtained," (emphasis supplied) is not an isolated example of carrier concern. Identical language is found in the preface to the Railway Fuel and Operating Officers' Association Diesel Electric Locomotive Book referred to and quoted at pages 56 and 57 of Employees' Exhibit 29. The latter book² is used currently as the basis for the promotional examination of the Louisville and Nashville Railroad. The promotional examinations, like the instruction books and various bulletins and trouble-shooting manuals, indicate that malfunctions are expected on the road, and that firemen

² A single copy of this book was deposited with the Commission.

as well as the engineers are required to take all necessary action to correct or prevent serious damage. (See, for example, question 53, in the Railway Fuel and Operating Officers' book referred to and quoted in full at EX. 29, pp. 57-8.)

In the light of the carriers' own documents, it is not surprising that when not testifying before this Commission the carriers were quick to concede that the diesel is prone to malfunction and that a trained fireman is essential to get trains over the road (see EX. 109). The carriers cannot and did not dispute the statements of their own officials recorded before the Railway Fuel and Operating Officers' Association and set out in EX. 109.

Finally, the carriers' own rules impose the duty of maintaining and restoring locomotive power on the fireman. (See, e.g. EX. 30, pp. 16, 50; EX. 52B and EX. 11, pp. 89 ff.) Thus, operating rule 911 of the Central of Georgia Railway, effective September 1, 1958, provides as follows:

On engines in road service fireman must patrol engines and make inspection of engine, temperatures, steam heat facilities, and other parts and give such attention as may be required. Special attention must be given battery charging circuits. Any unusual condition or irregularity detected must be reported to engineman and fireman must be governed by engineman's instructions.

Patrol of engines must be made at initial stations and at other stops. Unless otherwise provided when time between stops is 30 minutes or more, and at such other times as may be directed by engineman, fireman must patrol engine while train is in motion.

Other rules of the carriers and particularly those noted on pages 89-91 of Employees' Exhibit 11 are similarly instructive as to the duties of the fireman with reference to maintaining locomotive power, as are the many promotional examinations put into the record by the employees. (EX.s. 26, 41, 52A; EX. 30, pp. 13-38.)

The record also shows that the role of the fireman-helper in detecting and correcting malfunctions on the straight-electric engine is substantially the same as on the diesel-electric (EX.s. 94, 95 and 96). The carriers admit that in the major respects, the duties of the fireman on diesel and straight electrics do not differ materially (CX. 32, p. 14).

In the light of this record the majority report is clearly wrong in its assumption that diesels are not prone to malfunction. The majority report is also ambivalent. They say that even if the diesel malfunctions, the fireman has no essential function. To show this the majority discusses (pp. 40-43) various considerations it deems relevant in this regard. Let us examine these considerations, their validity, and support or lack of support in the record.

B. The Controlling Consideration In Maintaining Motive Power Is Qualitative Not Quantitative

The very first consideration the majority suggests as relevant (p. 40) is totally irrelevant and its characterization by the majority inaccurate and misleading. The type of malfunction which the employees said diesels are prone to and as to which they detect and correct are the minor ones, not the major ones.

This distinction should be kept firmly in mind. The malfunctions which the firemen described as those which they can and do correct are those which involve the use of the tools they have available, including the regular tools, such as screwdriver, pliers, and wrenches (see, e.g., Tr. 51, pp. 315-16 and EX. 117, p. 19) and the make-shift tools such as blocks of wood, files, pieces of cardboard and other such items (Tr. 47, p. 6794; Tr. 48, p. 6923, 6926, 6939-44; EX. 10 and 11 and Tr. 54, pp. 7756-78; EX. 51 and EX. 30, p. 80; and EX. 117, p. 19; Tr. 46, p. 6556) or for which no tools are necessary—just a pair of knowledgeable hands. It is these minor or temporary adjustments which the firemen make on the road. Obviously, the majority swallowed the carriers' deliberate attempt to confuse the issue by indicating that major repairs cannot be performed by the fireman and that only the shop forces are equipped with the delicate instruments with which to make such repairs. The employee witnesses did not contend that it is possible to change a crankshaft or to make such other major repairs on the road. (See, e.g., EX. 117, pp. 81, 236; Tr. 51, p. 7315.) Firemen have more than enough to do correcting minor malfunctions. Of course the minor malfunctions, if not corrected, will put diesel units out of commission, endanger the lives of the crew, and result in great delays unless corrected by the fireman. The record shows, moreover, that shop forces and facilities have been continually trimmed to the point where locomotives are not receiving adequate shop maintenance resulting in additional responsibilities with respect to malfunctions being cast on the fireman.

The employees emphasized that it is frequently possible to take temporary minor measures to correct or alleviate the effects of the malfunctions until the locomotive can be brought to the repair shop where a complete repair can be made. In many instances, of course, malfunctions are caused by transient factors which do not require the services of the shop forces. In other cases the malfunction is of such nature that the fireman cannot make a temporary repair to keep the engine operating, but he serves a valuable preventive function by shutting down a unit, thereby minimizing damage to the equipment.

The carriers' attempt to confuse is in conflict with their true position as revealed by their own officials' statements in forums other than

this Commission. Thus the Supervisor of Locomotive Operation of the B & O Railroad told the Railway Fuel and Operating Officers' Association:

On road operating difficulty, there are two classes:

1. Beyond one's control.
2. Within one's control.

First let us take, 'beyond one's control'. This means mechanical or electrical trouble that would demand shop maintenance. A shop incident is conclusive in itself, such as a broken wheel, axle, an unseen short in the electrical equipment such as broken wire or insulation worn off due to vibration; these would eliminate the unit partially or wholly. The engine crew under these circumstances would terminate the run under whatever power they had left, or proceed to a side track and wait for help.

Second, let us consider, 'within one's control.' This would also be different in two ways:

1. Freight service.
2. Passenger service.

In freight service, (there) being a third man or brakeman, the fireman would go into the engine room, proceed to correct any trouble within the scope of knowledge he had obtained. This means proceeding under circumstances without stopping the train, if possible.

Today, high speed passenger road operation demands the utmost cooperation of the engineer and fireman combined with the utmost coordination of all the steps these two men will take in facing the correction of a road difficulty. (EX. 100, p. 21.) (Emphasis supplied)

The majority report also refers (p. 40) to the ICC regulations regarding road diesel inspections but then fails to record the undisputed fact that the percentage of diesel engines failing inspection today are as high as ever and also greater than in steam days (EXs. 13-18, Tr. 55, p. 7827). Thus, the shop forces are putting out more engines on the ready tracks which in fact are not fit for service and this casts a greater burden on the fireman.

The second factor asserted by the majority as relevant (p. 41)—the proportion of time spent by the fireman answering alarms or correcting malfunctions—is also irrelevant and characterized in inaccurate and misleading fashion.

The majority report infers from the data cited that since the amount of time which the fireman devotes to malfunctions is limited, therefore the services he performs are not important. This argument has as much to commend it as evaluating a city fireman by dwelling upon the number of hours per month spent fighting fires and the number of hours awaiting call in the firehouse. The record shows that minor mechanical troubles cause delays and breakdowns and if left unattended soon become major troubles. The essential point is not the amount of time spent correcting malfunctions, but rather that there is somebody present to do the work. It is not time but performance that is the test. That the qualitative test is controlling was clearly

recognized by the Chairman of this Commission (Tr. 56, pp. 8120-21) quoted earlier in this opinion.

The data cited by the majority are also misleading. The carrier surveys relied on show alarms occurred on 14-15 percent of the freight trips. But the carrier surveys do not show and the majority report fails to note the corrective work performed on trips where the malfunction was not of a type which set off an alarm. The majority also refers to the organizations' surveys only with respect to percent of time answering alarms but fails to note that alarms occurred on about 32 percent of the trips surveyed.

The majority also notes (p. 41) that the BLF&E surveys showed that malfunctions increase in direct proportion to the number of units in the locomotive consist; but would dismiss this uncontroverted fact simply by concluding that time alone is the test.

C. The Fireman Is Qualified To Correct Malfunctions

The "relevant considerations" discussed in paragraph c on page 41 are directed toward the ability of the fireman to correct malfunctions. They are stated so inaccurately as to warrant sentence by sentence dissection.

1. "Locomotive malfunctions corrected by firemen are fairly minor." As previously shown the firemen never claimed they corrected major trouble. The problem is one of semantics created by carrier design and not perceived by the majority. A "minor" malfunction is one which the fireman can detect and correct. A "major" malfunction is one he cannot correct; but one he may detect and prevent serious damage or personal injury by shutting down the unit or stopping the train. Any malfunction—"major" or "minor"—may put an engine out of service and cause delay. Hence, whether the malfunction is "major" or "minor" the fireman plays an invaluable role.

2. The second sentence is devoted to EX. 4 and the list of electrical and mechanical malfunctions. These and other malfunctions were described and explained at length by many qualified witnesses (see Tr. 45-50). The majority report's statement (p. 41) as to the list of malfunctions that "many . . . fireman-helper witnesses conceded they were unable to explain or to correct" is totally unfounded and grossly misleading. Subsequent to the introduction of EX. 4, the organizations presented nine witnesses who testified in person before the Commission with respect to the duties and functions of the fireman generally. Of these nine witnesses the carriers directed questions in cross-examination with respect to EX. 4 only as to three of such witnesses. (Tr. 57, pp. 8402-8; Tr. 59, pp. 8739-42; Tr. 60, pp. 8750-52, 8765-7; Tr. 62, p. 9260.) Significantly, not one of

these three witnesses had currently been acting as fireman and two were promoted on the steam locomotive. (Tr. 57, pp. 8401-02; Tr. 59, p. 8640; Tr. 61, p. 9120.) Of the remaining six witnesses, none of whom was queried on EX. 4, three were actively serving as firemen (Tr. 59, p. 7204; Tr. 53, p. 7668; and Tr. 53, p. 7724). Whatever the background and current employment status of the witnesses interrogated with respect to EX. 4, it is inaccurate to state that many conceded they were unable to explain the malfunctions. It is clear, for example, that the employee witness testifying at Tr. 57, pp. 8405-8406, clearly knew the answer to the question respecting malfunction No. 44M on page 124 of EX. 4. His statement is obviously consistent with the last paragraph on page 124 of EX. 4 as to what the fireman does, namely "he keeps a close watch to see that it does not heat to the danger point before the unit can be set off".

Wholly apart from whether or not engineers who have not had diesel firing experience or have not been firemen for many years can answer readily the questions put with respect to EX. 4, the most that such cross-examination tended to show is perhaps that engineers promoted during the steam era may not be qualified to go back and act as firemen without some additional training or refresher course. Such cross-examination should also be considered in the light of the admission of the carriers that "if there arises anything which the (new) fireman cannot handle, the engineer does it * * *." (CX. 151, pp. 107-8.) By such statement the carriers acknowledge that the engineer obtained his knowledge by working as a fireman. If the carrier cross-examination on this point proved anything, it indicated the need for a more expansive and continuing training program for firemen, which, of course, is what the organizations sought.

3. The statement that firemen receive no specific training lies in the face of the record. The oral and written statements of the employee witnesses and the wealth of trouble-shooting materials, promotional examinations and other written documents prepared or supplied by the carriers and introduced into the record by the employees and referred to above, show conclusively that firemen do receive training—even though most of the training is on their own time and expense or on-the-job training. The statement that few railroads furnish firemen special tools to correct malfunctions has already been shown irrelevant. The firemen carry their own tools (Tr. 51, pp. 7315-16); and also use, at carrier bequest and approval, such "tools" as fusee caps, flagsticks, rubber bands and cups (Tr. 46, p. 6556).

4. The majority's conclusion (p. 41) that firemen have at most a limited "craft skill" in maintaining locomotive power" is wholly inconsistent with the record and the majority's own statement on the

next page (paragraph d) that the "engineer * * * is skilled in the operation of the locomotive." The engineer attains his craft skill only by his experience and training as a fireman-helper.

5. Finally, the majority makes an argument based on the fact that firemen usually receive only a "few student trips". This argument overlooks several important points: first, an untrained fireman is not given sole responsibility for handling malfunctions enroute. He is always working under the supervision of the engineer who can guide and instruct him during the early stages of his career. Indeed a carrier witness sustained the employees' contention on this point, saying: "If there arises anything which the (new) fireman cannot handle, the engineer does it * * *" (CX. 151, pp. 107-8). Second, during the first years of his career, he is expected to study and prepare himself to take the promotional examinations. Thus, day by day, week by week, and year by year he is gradually adding to his fund of knowledge through his studies for the promotional examination and through his practical experience on the road. Third, in every line of endeavor it would be ideal if human beings could be found trained and able to step into the shoes of their predecessors without the loss of time and efficiency necessarily involved in training. Unfortunately, such conditions do not exist in an imperfect world. Everyone, whether he comes to a position schooled or unschooled, must learn the specifics of his job. The same is true of the position of a railroad fireman. The majority's argument comes down to this: during the initial months during which the fireman is learning the rudiments of his craft, he is not able to make the contribution he is able to make in later years. Therefore, they say: "Let us dispense with his services altogether, because at first he cannot make the same contribution he is able to make later."

D. The Engineer By Himself Cannot Maintain The Motive Power Safely, Efficiently, Or Without Undue Burden

In paragraph d, pages 41-42, the majority report again assumes contrary to the record that malfunctions are infrequent but that in any event the engineer alone can correct them, although admittedly with "some delays". The majority also assumes in paragraph (e), page 42, that the periodic inspections made by firemen while the train is in motion are also unnecessary. The majority is compelled to this conclusion since it holds the engineer can do everything necessary to detect and correct malfunctions. The majority, by proposing to place the entire burden of operating the train and maintaining the motive power on the engineer, leaves the engineer with two choices: to continue to operate the train ("at reduced power") with an alarm bell

sounding; or stop the train completely and make a standing inspection. Let us look at the effect of these proposals on safety and efficiency.

First, there are many malfunctions which will be discovered only by making periodic inspections when the train is in motion. (EX. 4, pp. 139-143; Tr. 46, pp. 6688-90.) Some of these malfunctions, if not detected in time, will cause fires, explosions, and derailments (EX. 109, pp. 34-35; Tr. 46, p. 6661). There may be no alarm, for example, preceding a fire or imminent explosion. During periodic inspections, the fireman by his senses of sight and smell can detect these malfunctions in the offing and frequently do something to avoid them (Tr. 46, p. 6660; EX. 109, p. 69). Another example is the condition of locked wheels causing flat spots to be developed on the wheels and false flanges which, if undetected for a length of time, will cause a derailment. Similarly, a defective gear on a traction motor, if undetected by the fireman on periodic patrol may break, causing the gears to lock suddenly and lead to a derailment. It is hardly necessary to add that derailments always present the hazard of disastrous consequences to the members of the train crew and the public in the immediate vicinity.

The record also shows that the alarm system is no substitute for the fireman for many reasons. First, there are many malfunctions for which there are no alarms (see, e.g., EX. 4; Tr. 45, p. 6458; EX. 109, p. 12). Second, even when a malfunction occurs and an alarm sounds, the alarm does not indicate what is wrong, but only that something is wrong (e.g., Tr. 45, p. 6458; Tr. 49, pp. 7047-8; EX. 109, p. 12). Third, the alarm system itself malfunctions and hence a malfunction may occur without the alarm sounding (e.g., EX. 4, pp. 144-154; Tr. 49, pp. 7079-80; Tr. 50, pp. 7210-11). Fourth, there are false alarms, that is alarms that sound when in fact there is no malfunction (e.g., Tr. 50, p. 7211).

Directly related to the malfunctioning of the diesel and straight electric locomotives is the duty and function of the fireman to make periodic inspections of the unit or units in the locomotive consist. The fireman is required by oral and written instructions of the carriers to make these periodic inspections of the units. (See, e.g., EX. 29, p. 7; EX. 11, p. 113, and EX. 30, p. 43.) The reason for requiring these inspections is obvious in the light of the many malfunctions that occur on the diesel and straight electric locomotives, the fact that the alarm system does not alert the engine crew as to the type of malfunction, and the ability to discover such malfunctions only by periodic inspections.

It is taxing the credulity of any reasonable person to ask him to accept the proposition that periodic inspections are unnecessary. From the time diesel electrics were first put into service, the carriers

have required firemen (helpers) to make periodic inspections of the lead unit and all trailing units in the locomotive consist and continue to do so today. The fact is that periodic inspection is required by carriers because of the realization that mechanical maintenance is directly related to the safety and lives of the employees, passengers and the public (Tr. 46, p. 6661).

Moreover, the engineer cannot, consistent with the safety of the public and his fellow employees, continually stop and start the train, as suggested by the majority to answer an alarm or to make a periodic standing inspection to detect and correct malfunctions. It is undisputed that it is inherently dangerous to stop and start heavy trains on the road. Whether operating in single track, double track or CTC territory, there is always the danger of rear-end or head-end collisions with following or opposing trains, including passenger trains. In starting and stopping there is also always the risk of breaking trains apart, derailment, and also the possibility of damage to lading (Tr. 30, pp. 7212-13; EX. 95, p. 28).

Unlike ordinary manufacturing and other corporations, railroads are affected with a strong public interest. This interest requires that carriers afford prompt and efficient service to the shipping public. The principal product that the carriers have to sell is on-time delivery. When every effort is being made by the government to promote production to bolster our economy and the national defense, this is not a time to experiment on systems which admittedly will produce train stoppages. That the carriers are willing to accept delays should not be the controlling consideration. The public interest should also be considered.

The record shows that the fireman is ordinarily able to detect and correct malfunctions while the train is in motion and avoid the necessity of stopping the train. The majority's suggestion that the engineer alone can handle the detection and correction of malfunctions and when necessary stop the train to do so, is unsupported by the record and contrary to the carriers' prior statements. (See, e.g., EX. 100, pp. 21, 58-9.) As previously stated, the record shows many malfunctions which the engineer can never detect from the cab. These include many malfunctions that do not have a corresponding alarm. But if we assume there is an alarm indicating a malfunction of some kind, or that the train is not responding properly indicating something wrong in one of the units, the engineer's only alternative is to stop the train; he can do virtually nothing from his seat in the cab. Stopping is not only dangerous as indicated above but also inefficient. A long and heavy freight train cannot be stopped in a matter of seconds. The brakes must be applied gradually, and it may take minutes to stop

a train. The brakes must then be secured. The rear flagmen, on signal from the engineer, must descend and move back along the track as much as a mile or more to flag any train that may be following to avoid collision. The engineer must then proceed from unit to unit to find which of several units is malfunctioning and correct the malfunction or shut down a unit. This would be time consuming. After the malfunction is located and corrected, assuming that this can be done with only one man, the flag must be whistled in, and again time allotted for the flagmen to return to the train. This procedure may consume at least 20 minutes assuming the engineer can find and correct the malfunction in 1 minute (Tr. 46, pp. 6690-93). Finally, if the train is stopped on a grade, it may be impossible to start the train without doubling, that is—without uncoupling the train and starting up with one-half of the train to the crest of the grade and then returning for the second portion of the train (Tr. 46, pp. 6693-4). In addition to the matter of time, there is the added expense. The record shows that the cost of stopping and starting a typical freight today, that is one with 4 diesel units and 100 cars would be in excess of the daily wage paid the fireman (EX. 97, pp. 4-5; EX. 30, p. 15).

Efficiency of operation would also be impaired if the periodic inspections of firemen were discontinued and along with it the making by the firemen of inspection reports showing what malfunctions occurred en route and any other erratic action which should be called to the attention of the shop forces for permanent and major repairs. The shop forces are dependent on such reports. The shop forces are not in a position to detect malfunctions and their work is greatly expedited by the post-run inspection report. Without a fireman aboard, the engineman would be handicapped in learning what went wrong on the lead or trailing units and hence his report will be of far less value to the shop forces. (For carriers' recognition of these facts, see EX. 109, pp. 26, 50, 55 and 69.)

In road freight service, the record demonstrates that the operation of trains without firemen is, in fact, impossible, because of the fact discussed above that many malfunctions require two men to detect and correct, since they can be discovered only when the train is under load—that is moving at ordinary rates of speed (EX. 4, pp. 139-143). Obviously this condition cannot exist when the engineer stops his train.

The majority report, by its suggestion that in lieu of stopping the train the engineer may reduce power, has in effect accepted the carriers' argument that the engineer can simply ignore the alarm signals (Tr. 71, pp. 1158-61; EX. 28, pp. 41-46). This is a tongue in cheek argument. It hardly squares with the emphasis placed by the carriers in

their case in chief on the value and reliability of alarm systems as a replacement for the fireman. Met with testimony that the engineer is in no position to answer alarms, the carriers, in rebuttal, claimed the engineer can ignore the alarm. Let us assume that the engineer is instructed to ignore the alarm. Assuming that the engineer can survive in sanity to listening to the alarm bell for the many miles that may intervene between the sounding of the alarm and the next stop, what happens to the diesel units while the alarm is being ignored (Tr. 49, pp. 7057-8, 7072-5). For example, a low oil alarm may be sounded when the engine oil has reached such a critically low point that if the unit were continued in operation serious damage to the entire engine mechanism would result. The manufacturers of diesel locomotives and the carriers installed expensive and elaborate alarm systems for a definite purpose and that purpose obviously was not that the alarms should not be answered. The record shows that if malfunctions are not detected and attended to promptly the consequence may be serious damage to expensive equipment (Tr. 46, p. 6688).

The diesel revolution has increased the need for and responsibility of the fireman with respect to maintaining and restoring locomotive power and this function represents the efficient use of a substantial part of his workday. Thus where the fireman used to have only one fire to tend, he now has many diesel units to keep running. To do so, he must make periodic inspections to detect and correct the malfunctions that may develop on any one or on several of the units. More than half of the road trips involve the use of locomotive consists of three or more units (EX. 18, pp. 49 and 51). Malfunctions increase in direct proportion to the units in the consist (EX. 18, pp. 50-52).

But, the important consideration in the fireman's role in maintaining and restoring locomotive power is not the total time in minutes and hours that are involved in this duty. The important factor is qualitative. While it may take the fireman only a few minutes to find and correct a malfunction on a periodic patrol as part of his ordinary duties, it may take 20 minutes to half an hour for the engineer to find it by stopping the train, assuming that it is one of those malfunctions that will appear when the train is not under load or in dynamic braking.

Removing the fireman and transferring the duty of detecting and correcting malfunctions solely to the engineer would place an intolerable burden on the engineer. In the first place, with the trains of today having many diesel units or straight electric units in the consist, trains hauling many cars extending long distances in length require the full time and energies of the engineer. See, e.g., EX. 109, pp. 61-84 for carrier recognition of this fact. The heavy tonnage of to-

day's freight trains demands constant attention as to such matters as the amount of energy to be applied on the throttle and the braking power to be applied on hills, curves, and various kinds of terrain in all types of weather conditions. To the great skill required of the engineer in the actual operation of the locomotive consist must be added the necessity to closely observe signals, the right of way, and approaching traffic, pedestrian and vehicular. It would be unreasonable to require the engineer in addition to his present heavy responsibility to assume the responsibility for the detection and correction of malfunctions. Even though he is today responsible, under the operating rules, for the operation and safety of his train, historically the fireman has always had the primary burden of maintaining and restoring locomotive power and this is where it should remain. This division of authority is essential for efficiency as well as for safety. Moreover, the fact is that many engineers were promoted during the steam days, or have been running trains as engineers for many years without having returned to the service of fireman. Because of these facts they freely admitted that they rely almost exclusively on their firemen to maintain and restore locomotive power, detect and correct malfunctions, and keep the units running and get the train over the road (EX. 29, p. 84; EX. 30, pp. 36, 68, 70).

The majority report discusses the pre-run inspections with respect to road service at page 42. Actually this inspection is made in road and yard service. The majority, of course, gives no inkling of what work is involved here. The job function of the fireman with respect to the pre-run inspection was summarized in the record as follows:

"It is standard operating procedure in both yard and road service for the fireman and the engineer to make an inspection of the locomotive prior to each run or tour of duty. The inspection is carried on with respect to both electric and diesel locomotives. During the course of the inspection, we will check the brakes and rigging for loose or dragging parts to be sure that there is proper rail clearance, the supply of sand and the operation of the sanders, brake applications and piston travel and brake cylinders, position of angle cocks and shut-off valves, the supply of flagging equipment, such as fuses and lanterns, the supply of water for cooling and drinking, the governor oil level, loose or broken belts on the generator or other parts, the ammeters, temperature and pressure gauges, the fuel oil level, the ground relay buttons, lube oil pressure switches, fuel and speed indicators, the operation of front and rear headlights, position of rotative valves and for any water or fuel leaks. We also listen for unusual sounds which may indicate defects.

"In order to save time the various aspects of these inspections are divided between the fireman and the engineman. On the other hand, however, a good number of important aspects of the inspection must be carried out by both the engineer and the fireman.

"For example, in checking the airbrakes, the engineman will apply them while the fireman is on the ground to see that the brakes actually apply and release. At the same time the fireman notes the piston travel and the operation of the sanders, that is to see whether or not sand is coming out from sand pipes properly.

"Two men are also necessary to check motor circuits when there is multiple unit operation. To carry out this phase of the inspection the engineman usually operates the throttle in the lead locomotive and the fireman proceeds through the trailing locomotives to check the amperage gauge to determine whether or not the traction motors are receiving electrical energy. If the gauges indicate amperage the fireman signals the engineer with the whistle and then proceeds to the next trailing unit.

"In road operations we normally have from two to four units together and of course a complete inspection as I have just described is made of each of the locomotives." (Tr. 50, pp. 7207-8; see also, EX. 3, pp. 1-2 and EX. 94, pp. 1-2).

The majority report does recognize, however, (p. 42) that pre-run inspection tests require two men to make in a safe and efficient manner. In testing the brakes and the sanders, one man must be in the cab to apply the brakes and sand valves and one man must be on the ground to determine whether the brakes apply and release properly and whether the sand is deposited on the rails in front of and behind the wheels properly (Tr. 50, p. 7208; EX. 29, p. 126; Tr. 52, p. 7403). Two men are essential to perform this function. Few mechanical matters are as important to safety as the brake and sand operations. As to the carrier contention that the shop forces can and do assist in the pre-run inspection, numerous employees testified that frequently engines are placed on the ready tracks by the shop forces which are not fit for service (e.g., Tr. 50, p. 7209; Tr. 51, pp. 7302-04; Tr. 53, pp. 7680-81; and EX. 109, p. 19). The importance of the pre-run inspection, by a two-man engine crew is recognized by the carriers also. (See e.g. EX. 109, pp. 18, 35, 57.)

The majority also glosses over the fact that the train crew is not always with the engine crew when the latter crew picks up the engine (e.g. EX. 29, p. 74). Hence a two-man engine crew is essential to make the inspection. Notwithstanding this record, the majority brushes aside this function on the basis of time spent and the assertion that this duty is primarily the engineer's responsibility (p. 42).

E. The Fireman Has Essential Duties Relative To Correcting Malfunctions in Yard Service

Malfunctions in yard service are discussed by the majority report, paragraph f, page 42, again primarily on the basis of time involved rather than the quality of performance, the assumption that the engineer can do everything, and that if he cannot, shop forces are readily available in the yards. These views are not supported by the record.

The duties of the fireman in yard service with respect to detecting and correcting malfunctions is similar to that in road service. The record shows that in yard service the fireman must make periodic inspections of the unit, answer alarms, and detect and correct malfunctions of a character similar to that in road service. These include malfunctions which require two men to detect and correct and malfunctions for which there are no alarms or for which there is an alarm but which does not sound (Tr. 50, p. 7210, Tr. 51, pp. 7402-7405; Tr. 53, pp. 7679-80; Tr. 54, pp. 7787-88; Tr. 60, pp. 8779-80; EX. 29, pp. 88, 96, 123, 126; EX. 30, pp. 4, 68; EX. 97, pp. 61-63). The carriers' own surveys clearly establish that there are malfunctions to be corrected in yard service. Thus the carriers' 1958 survey showed that in 750 tours of duty surveyed in yard service, 1,010 routine inspections were made, and that corrective action was taken on 421 or 41.7 percent of such routine inspections. The carriers' 1959-60 survey showed that in 702 tours of duty in yard service, 1,149 routine inspections were made and that corrective action was taken on 499 or 43.4 percent of such routine inspections (CX. 13, pp. 13, 20, 24).

The removal of the fireman in yard service would seriously impede the efficiency of railroad operations in the yards and elsewhere. Although yard engines do not ordinarily obtain high speeds, nonetheless fast and efficient operation in the yards is essential for it is here that trains are made up and broken up for delivery to local customers or transshipment on the road to other destinations. The road freight trains schedules depend in a large measure on the work done by the yard engines and hence yard service efficiency must also be maintained. In this respect special attention should be given to testimony of yardmasters (EX. 97, pp. 61 and 63) whose responsibility is to oversee the operations in the yards.

Since two men are frequently necessary to detect and correct malfunctions, it is essential to have a fireman in the engine crew to carry out this work (e.g., EX. 29, p. 96; Tr. 50, p. 7210). Frequently yard engines operate on ascending and descending grades as well in hump yard operations. Here it becomes important to have a fireman

in the cab of the locomotive to reset such devices as the overspeed trip or ground relay before the engine loses momentum on the grade or hump and to avoid backing down and starting over again with consequent loss of time and inefficiency. Moreover, in the hump operation, if there is power loss at a critical time, the car being humped at the crest of the hill may roll back and possibly hit the pinpuller. (See, for example, Tr. 51, pp. 7403-4.) Many yard engines work in heavily congested terminal areas. In such places the breakdown of a locomotive which cannot be repaired for the absence of a fireman, may result in the tying up of the entire terminal area with consequent delays to passengers. (See, for example, EX. 29, p. 123.)

The record does not support the majority's view that yard engines can always be quickly reached by shop forces. The tendency of railroads is to cut and reduce to minimum or below minimum standards the number of shop force employees available (e.g., EX. 29, pp. 8, 116). There are many outlying yards where there are no shop forces available, and even in those areas where shop forces are available, yard engines are not always quickly within reach but may move many miles from the point where the shop forces are located (e.g., Tr. 51, p. 7405; Tr. 54, p. 7788). The public should not have to tolerate waiting 15 minutes or more at blocked street crossings for the want of a fireman and while a shop force employee is supposedly on his way to a stricken yard engine (EX. 29, p. 96).

The majority report purports to deal with the safety aspects of the fireman's mechanical functions in paragraph g, pp. 42-43 and concludes that the "fireman does not make an essential contribution to safety. . . ." Its statement that "It appears from the record that the durability of the diesel and periodic shop maintenance and overhaul, rather than the mechanical contributions of the fireman-helper en route, has helped to improve the industry's accident record" has no support in this record. Significantly here, and throughout the majority report, not a single record reference is given to support any of the conclusions reached.

The majority's callous disregard for safety is indicated in several ways. First, they say that "the presence of the firemen has not prevented" all casualties due to defective locomotives. Hence, there is no essential need for the fireman. This argument defies logic. Second, the majority makes shoddy and perverted use of the BLF&E safety award applications. This fact has already been fully developed in the forepart of this dissent (para. 3(c)) and for brevity will not be repeated here.

The record demonstrates beyond question that the conclusions reached by the majority report with respect to the fireman's mechani-

cal functions (p. 43) are based (1) on facts and assumptions not supported by and directly contrary to the record; and (2) theories which are totally irrelevant to the issues.

IV. The Fireman Is Necessary To Relieve the Engineer

The majority's discussion of the role of the fireman in relieving the engineer begins with a statement as to the organizations' position. First, that the fireman-helper is necessary for the temporary relief of the engineer, and second, to take over the control if the engineer is disabled by sudden illness or death. Except for so stating the organizations' position, the majority confines its discussion to one sentence: "When the engineer needs temporary or emergency relief, the locomotive can be stopped in road service with minimal delay in the absence of a fireman, and in yard service with practically no delay." In this casual manner the position taken by the organizations is dismissed. Turning first to providing temporary relief, the suggestion of the majority is that this will be fully met by stopping the train. This suggestion indicates a lack of understanding of railroad operations. Important among the kinds of temporary relief given, is relief to care for fatigue. Certainly neither the carriers nor the public would tolerate stoppages for this purpose. It is here in fact that the fireman performs one of his most important functions.

While there is no definite rule on the subject, the employees showed that as a general practice in yard service a fireman will operate the locomotive for various lengths of time depending on his skill and ability while the engineer performs the fireman's duties on the left side of the locomotive (e.g., Tr. 51, pp. 7405-6; EX. 29, p. 123). The employees testified that the engineer becomes fatigued in operating yard engines for a full tour of duty because of the various factors including the eye strain of operating at night against lights, the necessity for frequently placing one's head and shoulders in an unnatural and uncomfortable position out of the window of the cab in order to receive signals and to observe track conditions (e.g., EX. 30, pp. 38-9; Tr. 50, pp. 7238-9). The employees also pointed out that there are similar factors working toward the fatigue of the engineer in road service. In road service the engineer has an additional factor creating fatigue and cramping of legs and body in that there are dead man control features on most road locomotives. The necessity for pressing the foot pedal or exerting additional leverage on the throttle in order to keep the dead man's control from actuating is an additional fatigue factor (e.g., Tr. 53, p. 7741). Hence, the fireman and engineer will change positions in the cab, each carrying out the other's duties and functions so as to give the engineer necessary relief.

In affording the engineer relief, the fireman is also performing a positive function in his own development toward becoming an engineer. The best way to learn to operate a locomotive is to have the experience of operating locomotives with varying numbers of diesel units, varied numbers of cars, both loads and empties over different kinds of terrain and under the full spectrum of weather conditions. This type of training and experience is indispensable in learning to properly handle the train over the road and in the yard (see, e.g., Tr. 53, p. 7741).

The majority concedes the need for providing emergency relief. This conclusion is predicated solely on the safety award evidence, again disregarding the substantial additional evidence presented by the employee witnesses. In road service, the majority disposes of the matter by saying that any member of the train crew riding in the cab, such as the head brakeman, can easily stop the train and that the infrequency of these instances, again relying on safety award applications, is not justification for retaining firemen-helpers permanently on road freight trains. We are again at a loss to understand why the majority should assume that the frequency of emergencies should be measured solely by the number of safety award applications. As previously stated, almost every employee witness referred to cases of his own experience where emergency relief was necessary. But even more serious is the assumption that the emergency relief can be given by the head end brakeman. What the majority overlooked is that the head end brakeman is frequently required to work on the ground. He may be on the ground and performing his own duties in road service according to organization witnesses as much as 50 to 65 percent of the time (EX. 29, pp. 63 and 130); and according to a carrier witness as much as one-third of the time (CX. 153, p. 24).

When it comes to yard service, the majority understandably indicate more concern. Here again the number of emergency situations is absurdly equated with the number of safety award applications. The majority would overcome the absence of any other member of the crew by simply requiring the carriers to install dead man controls in yard diesels. The installation of the dead man controls would by no means meet the problem involved. The dead man control is not a perfect instrument. The record shows the engineer's body will slump on the controls preventing the dead man feature from functioning (EX. 30, p. 48). Serious accidents can result in such a situation. But there is another significant consideration. The operation of the dead man control feature requires that the engineer press a foot pedal to keep the dead man's control from activating. This would add an undue burden on the engineer who in the absence of a fireman would already be seriously overburdened.

V. The Fireman Is Needed To Perform Other Important Miscellaneous Duties

There are numerous other duties and functions of the fireman which the majority does not even mention and which bear directly and importantly on safe and efficient railway operations. These duties relate both to yard and road service. Some of these duties are as follows:

(1) *Flagging Ahead Under Rule 99*

Under the operating rules of all carriers, the fireman is required to flag ahead whenever circumstances require. Some of these circumstances were described by many witnesses (e.g., Tr. 51, pp. 7407, 7410; EX. 30, p. 12). The following testimony is typical:

Sometimes a freight train has to make an unscheduled stop because a piece of equipment being carried has come loose and shifted its position or because of derailment or because of any of a hundred other causes. Often the reason for the stop, particularly in an emergency stop, causes danger to a train coming down an adjoining track. The adjoining track may have been fouled, hence it is absolutely essential to send the fireman on ahead in front of the engine at a safe distance so that he can flag down any train that is passing on the adjoining track. In the meantime, of course, the brakeman makes an inspection of the train in order to find out what has happened and to make any necessary repairs; and the flagman goes to the rear of the train in order to flag down any trains that may be approaching in the same direction. (EX. 30, p. 57)

A fireman may have to flag ahead even when freight trains are making scheduled stops to set out or pick up cars (see, for example, EX. 30, p. 12). Failure to have a man ahead of the train to flag down opposing trains can obviously be disastrous. The majority's proposal invites such disaster.

(2) *Train Orders*

Train orders are of great importance. Failure to comply with a train order may result in rear end collisions or sideswipes, including wrecks with passenger trains. The fireman not only assists the engineer in picking up such train orders en route when such train orders are passed up to the train on the fireman's side, or when it is safer or more efficient for the fireman to come over on the engineer's side and pick them up, but the fireman also reads the train orders and checks on the engineer to see that he complies with such orders. Although train orders are also supposed to be read and checked by the head brakeman and the head end brakeman does read such orders when he is available in the cab of the lead unit, the fact is there are many occasions when the head end brakeman is riding in a trailing unit or in the caboose. The record shows the importance of this duty to the safe

and efficient operation of the train (Tr. 52, pp. 7538-9, 7542-43, 7556 and 7575-6).

(3) *Flagging Grade Crossings*

There is no ground crew accompanying the engine and the engine crew when (1) a yard engine crew picks up the locomotive at the roundhouse and proceeds to the yard areas in which they are to work, (2) a road engine moves from the ready tracks to the yard to pick up the train, and (3) upon the completion of a tour of duty a road engine or yard engine yards its train and proceeds to the roundhouse. Frequently, it is necessary for the light engine to proceed over public crossings and under these circumstances the fireman is required to flag the crossing. No flagman is available to do this work. The importance of this duty with respect to safety of the public and that of employees is apparent (e.g., Tr. 51, p. 7407; EX. 29, p. 74).

VI. Findings of Other Tribunals Are Not Relevant

The majority recognizes that whether the fireman should be retained, which is the question before this Commission, has not been considered by other emergency or arbitration boards appointed under the Railway Labor Act. There was no occasion, therefore, for the majority to refer to boards that have previously considered proposals to add additional engine-crew members on the ground of safety or efficiency. These prior proceedings are not relevant to the issue before the Commission, nor does the fact that the boards held against the organizations mean there was no merit to their cause. Finally, such references as are made to the prior proceedings are both inadequate and misleading. No good purpose would be served, however, by detailed analyses of these reports. The majority states that Emergency Board 70 noted that the lookout functions on road freight service could be and regularly was performed by the head brakeman while the fireman was present in or absent from the cab. This is implicit recognition that there is a lookout function to be performed on the left side. This duty falls in the first instance on the fireman. When he is absent looking after the engines it falls on the head end brakeman. When the head end brakeman is on the ground performing his duties, no one but the fireman is left to do the job. He is essential for that purpose as well as for maintenance.

VII. Foreign Experience Is Not Relevant

In a section of the report dealing with experience in foreign countries in respect of the manning of engines, it is stated by a majority of the Commission that "the fact the diesel and electric-powered freight and yard trains are operated safely and efficiently without

firemen in most other countries cannot be ignored." What is stated as "the fact" is not supported by ensuing discussion or citation; and, of course, the allegation of fact is untrue. This is but another illustration of the callous disregard of the record typifying the majority report.

So far as the so-called foreign experience is concerned, the discussion has been divided between Europe and Canada, and we will make the same division here. Foreign operations, wherever they may be, offer no reliable guide to this Commission, and, apparently, have appropriately been accorded little weight except to the extent that Canadian operations have been considered. Our purpose in pursuing the matter at this time is to cement the fact that foreign operations do not provide any precedent whatever for a proposal to operate American railroads without the presence of firemen. The might of America has been generated by independence of thought and action—independence of systems not comparable to our own. In times when economic stimulation is needed in competition with foreign adversaries, appropriate progress can not be made by moulding aspects of our industrial society to foreign forms.

In regard to the factual correctness of the contention, that firemen are not used on European railroads, it should be noted: in Switzerland, the record is clear that a fireman is required where trains run more than 40 kilometers (about 25 miles) without stop (Tr. 65, p. 9849). Incidentally, in Switzerland, as well as in the United States, the fireman is required to patrol the units and to observe signals (Tr. 65, p. 9853). Yard switching at Rouen, France is performed with a "ground man" on the locomotive relaying signals to the engineer (Tr. 65, p. 9854). In England, two man engine crews (engineer and fireman) are required between midnight and 6:00 A.M. and on scheduled nonstop service of more than 75 miles or 2 hours (Tr. 65, p. 9856). There are numerous other illustrations of two man engine crew operations which lack of time does not permit us to set forth.

In Europe, the individual serving as a fireman may not be identified by that title to his occupation. Nevertheless, an individual serving as a fireman is present. If the majority intends its findings to indicate to the contrary, those findings are incorrect and unsupported by the evidence adduced before the Commission. In America, where trains are longer and heavier and less frequent than abroad, it is the practice for the crew assigned to work with the engine and train to be self-sufficient, that is, to be able to perform its duties without extraneous assistance. In Europe, where trains are shorter and lighter, and distances between stops are small, more dependence is placed upon forces at stations to assist in getting trains over the road, and in switching. There, forces at stations are close at hand

to render mechanical assistance, to provide protection on the left, and to relay signals. While, as stated, these assistants may not be labeled "firemen," they perform identical services.

The majority alludes to a report of a Canadian Royal Commission of December 18, 1957 (the Kellock Commission), that the firemen were "not needed on freight and yard diesels on the Canadian Pacific Railroad." They refer to the organization's contention that this report should be disregarded, but state "we cannot be unmindful of the Royal Commission's conclusions and the subsequent agreements which the BLF&E signed with the Canadian Pacific and later with the Canadian National Railroad." Comments on the Canadian situation obviously are warranted.

This Commission conducted extensive hearings on factual issues, presumably on the assumption that its recommendations would bear direct relationship to the facts produced on the record before the Commission. If that be the case, as it undoubtedly is, the findings of another board, functioning in a foreign country, acting on another record, should not persuade us. This statement is true in any case, but there are special reasons for its applicability here. In Canada, the representative of the firemen was not able to make the record in the depth and scope it was able to make in the instant proceedings. There is no Federal or Provincial law in Canada accordin'g pensions to retiring employees. There, pension grants depend on the largesse of the carriers, to be granted or withheld at the employer's caprice. Employees in Canada, concerned with the risk of loss of pensions, and even discharge, were gravely handicapped in presenting a case. The employees, and witnesses, were for the reasons stated, restrained in their opposition to the demands of their employers. It should be noted also that the Canadian Report depended heavily on European experience which is not only irrelevant but distorted. Also relied upon was experience on a new iron ore railroad running through the wilds of Labrador. Canadian conditions on this as well as other carriers, it should be borne in mind, bear only superficial similarity to conditions on railroads in the United States.

The report of the majority attributes special significance to the "Canadian situation" without stating what that situation is, except to note that a limited number of yard and freight trips have been run without firemen since 1957. In this connection, the report states the fact to be that "no accidents traceable to the absence of the fireman have occurred on these trips." We are not conscious of the source of this statement; certainly it has no foundation in the record. The employees were gravely handicapped, since the Kellock Report, in securing the facts concerning Canadian one-man operation. Patently, no help was obtainable from the Canadian Pacific and Canadian Na-

tional Railways. And because of the serious factor that Canadian railroads may at their caprice withdraw pension grants from their employees, the employees before this Commission were unable to procure information directly from Canadian employees themselves. It was these same circumstances that gave rise to reluctance on the part of the Canadian employees to testify strongly against the position of their employers in the Kellock and other proceedings.

By the carriers' testimony before this Commission, one-man experience in Canada has been negligible. No conclusion can be drawn from it and it is entitled to no significance. On the Canadian Pacific firemen were used in 98.9 percent of road trips and 94.2 percent of yard tours. On the Canadian National Railway the percentage of use of firemen is even higher. And, it should be remembered, this includes one-man operations antedating the Kellock report. Further, since there are 1,768 furloughed firemen (Tr. 65, p. 9865) who are to be recalled to service when runs or work are available, it is patent that there must be few, if any, operations now being conducted without firemen.

The majority attempts to make a point that the BLF&E reached agreements with the Canadian railroads "which should not be treated as irrelevant to this case." The inference is sought to be created that the Canadian agreements were voluntary. The majority unfortunately reflects upon itself in trying to cast the agreements in that light whereas it knows that the Canadian agreements were executed in Canada by local Brotherhood officials, in face of threats of punitive legislation and other federal action from the highest governmental echelons. They were never concurred in by the Grand Lodge.

VIII. A Training Program for Engine Service Employees Should Be Instituted

The majority recognizes in Part 6 that the engineers are and will continue to be recruited from the ranks of firemen. The organizations have proposed a 4-year apprentice training program for firemen. This proposal may be summarized as follows: During the first year, the "locomotive helper-trainee" will receive 3 months' organized instruction after which he may be assigned to yard duty. During the second and third years the "locomotive helper-Class B" and "Class A" will receive 250 hours per year classroom and on the job training, on increasingly advanced levels. The fourth year will require still more advanced work for the "apprentice engineer". The plan will be under joint organization-carrier administration. (See EX. 108, pp. 2-9 for a more comprehensive statement of the proposal.) The majority, while recognizing that some form of training program is necessary, does not adopt the organizations' proposal, but rather

refers the question to subsequent discussion between the carriers and the organizations.

We think the organizations' proposals are sound and should be adopted. Carrier officials concerned with diesel operation when not speaking in light of this case, have recognized the need for education. Many of these statements have been collected by the organizations and presented to this Commission. Some of the stronger statements follow: Thus Mr. W. H. Powell, Supervisor of Locomotive Operation of the Baltimore & Ohio Railroad said (EX. 109, p. 23):

To assure success, the Diesel locomotive education program started long ago by our various railroad companies must be developed by all of us into a fiery active force that knows no limit, but that will embrace a comprehensive understanding of all methods, in theory and in practice, that will lead to successful high speed road operation through the controlling by us of road difficulties.

Mr. J. F. Sheneman, General Diesel Instructor of the Southern Railroad put it this way (EX. 109, p. 44):

From here we may go on and say a man may learn best by experience, but, if he were to learn all from experience on a Diesel locomotive, it may take about 50 years for everything to happen to him that could happen on a Diesel locomotive so he could say from experience he could take care of the troubles on his locomotive, and in the meantime the railroad would suffer many failures and delays. The approach to this must be more rapid than experience would provide, which means instruction on the part of management and study on the part of the men who operate and maintain the diesel locomotive in order to do a good over all job.

See also EX. 109, p. 13, statement of G. B. Curtis; p. 27, statement of T. J. Conway; p. 36, statement of F. M. Roberts; and p. 49, statement of W. R. Foster. These are a few of the references which might be cited.

Training programs in industry generally are widespread and the need for such programs increasing. (See generally EX. 108, a survey of such programs prepared by the Bureau of National Affairs, especially at p. 40.) Because the enginemen themselves have felt the need for education to do their job properly, and because adequate opportunities were not furnished by the carriers, the men themselves have been compelled to institute their own programs. See EX. 108, pp. 10-38; Tr. 51, pp. 7371-2; Tr. 53, pp. 7665-6.

These efforts, good as they are in themselves, place an undue burden on the employees, financially and otherwise. The training problem is a nationwide one—it should be met on a nationwide basis. If the organizations' plan is adopted, the employees will be able to do a better job and the carriers will benefit by having better trained personnel.

IX. A Reexamination of This Issue by the Commission Is Required

To say of the majority report merely that it is unsupported by the record is too generous. The plain fact of the matter is that it is contrary to the record. The organizations made an overwhelming case for the firemen, explaining in concrete terms the importance of his position. There were presented to the commission witnesses, documents, statistical surveys, photographs, maps, motion pictures, models, and diagrams. Quoted to the commission were the words of carrier officials themselves, when not before this commission, explaining the need for and duties of the firemen. All of this, and we repeat all, has been forgotten by the commission. Men who have given their lives to the service of the Nation's carriers are now told, in brutal fashion, that their work since the end of steam has been to no purpose. But these men know otherwise. There is a job to be done and these men have been doing it. These are men of pride in accomplishment. They would not have made their careers in useless jobs. The carriers need these men, their fellow employees need them, and the public needs them.

We urge upon the commission, before it plunges everyone into catastrophe to look again at this case because the issues are of paramount importance to all. We ask that the commission obtain a substantial extension of the due date of its report. During that period, every member of the commission will have ample opportunity to study personally every facet of the record. This commission can then present a report based upon the record—one that will do justice to the employees, the carriers, and the American public.

X. Further Dissent on Other Issues

Cogent time factors have posed serious problems in the composition and content of this dissent. The draft report of the Commission which embodied the views of the public members was delivered to the Commissioners on February 13, 1962, less than 10 days ago, and is comprised of 295 typewritten pages. Divided into 13 chapters, the subjects covered, except those discussed in introduction and conclusion, run the whole gamut of labor relations in the railroad industry. The breadth of subject matter of the report, to which dissents had to be filed by 3 P. M., February 23, 1962, is revealed by the chapter headings as follows: Manpower in the Railroad Industry: Operating Employees; The Use of Firemen-Helpers; Training of Engine Service Employees; Consist of Crews, I. Road and Yard Crews (Other than Engine Service), II. Manning of Motor Cars and Self-Propelled Machines, III. Crew Consist Laws and Regulations; Technological

Progress and Employee Security; Wage Structure: Components and Earnings; Wage Structure: Proposals and Recommendations; Fringe Benefits, I. Holidays, II. Differential for Night Work, III. Away-from-Home Terminal Expense; Interdivisional Runs; and Combination of Road and Yard Services. As of this writing (4 P.M., February 22, 1962) we have not received from the Commission's staff a large number of substitute pages of the draft report which we are informed are still in process of revision.

Limitation of time has rendered it impossible to express my dissent to the remaining sections of the draft report to the same extent as the fireman's issue. I have chosen to record my views in considerable detail concerning the proposed elimination of firemen for the reasons, among others, that the Commission characterizes the proposal as "the most important of the manning issues before the Commission," and that presentation of the issue consumed more time than any issue before the Commission. It was imperative that the facts relevant to the firemen's issue be disclosed accurately and in their true perspective.

Dissents by other Commissioners doubtless will cover the other issues more fully. The fact that I dwell somewhat briefly on the remainder of the report is thus not to be construed as an indicia that I am to any less extent opposed to it. The majority report, in my judgment, does a disservice to the American public and the railroad industry. It has been fashioned without regard for potentialities of promoting agreement and industrial peace.

It is a matter of fundamental concern that so many of the findings and recommendations made by the Commission are dehors its legitimate powers under the Executive order. Most frequently this has occurred in the area of wage structure.

The authority of this Commission is derived from the Executive order issued by the President of the United States on November 1, 1960. The first section of the order established this commission "to consider a controversy between, and involving certain proposals of," the carriers represented by the three carriers' conference committees and the five standard railroad operating organizations of employees. The authority of the Commission so established is further set forth in the second section of the order wherein it is stated that "The commission is authorized and directed to investigate and inquire into the issues raised by the proposals of the parties involved in the above-mentioned controversy * * *."

The proposals of the parties consist of notices issued by the carriers and employees on November 2, 1959, and September 7, 1960, respectively, and certain implementing proposals of the employees described in the first of their exhibits. It is unfortunate indeed that the majority has made findings and recommendations on many issues

beyond the proposals of either party. One example is sufficiently illustrative, although many more could be added if time permitted. The proposals of the employees provided that present mileage rates of pay be maintained, while the proposals of the carriers requested that mileage rates be cut 37½ percent. The range of the issue is thus crystal clear. Nevertheless, in complete disregard of the issue presented by the proposals of the parties, the Commission recommends that mileage rates be reduced by 50 percent—more than the carriers asked. This is a gratuitous and indefensible departure from the terms of reference of issues to this Commission. It would be well to add that the proposals of both parties before this Commission contemplated maintenance of the present dual basis of pay and preservation of the incentive system. Contrary to the proposals of both parties, the majority recommendations would give birth to a distorted form of dual basis of pay and destroy the incentive system in toto. In an era of intense competition among forms of transport, the majority incredibly proposes abandonment of the incentive concept and places a premium on slowness.

The multitude of infirmities pervading the majority report doubtless flow in large part from disregard of the record made by staff study and the evidence adduced by the parties. It is beyond controversy that the evidence shows the progressive reduction of hours in the workweek in American industry throughout the years to 40 hours, to 35 hours, and even less, accompanied by reduction of hours in the work month. Despite this, the recommendations of the majority endorse a maximum 52 hour week and a 208 hour month. This is a proposed adversion to archaic standards and concepts which obviously can not be countenanced.

All the evidence and studies before the Commission show the upward trend of wages in industry and commerce. The recommendations of the Commission, however, oppose this principle. The statement in the report that most employees would receive higher earnings as a result of the recommendations is untrue. Reference to the studies made by the Commission make that clear. They show, for example, that more than two-thirds of engineers and firemen in through freight service will take pay cuts if the recommendation were to be adopted. The recommendations of the majority thus have the incongruous effect, in face of current economic history, of lengthening already long hours, and reducing already low pay.

The evidence available to the Commission shows that areas of collective bargaining are expanding—not contracting. Participation of employee organizations in collective bargaining in other industries has spread into many fields once regarded as the sole concern of management, including the determination and scheduling of work

assignments. The majority, while giving lip service to the process of collective bargaining, has ignored this development in its recommendations. It recommends that the labor organizations make bargains destructive of their present rights and functions in collective bargaining—specifically in the manning issues, the interdivisional run issues, and the issues concerning the combining of road and yard services.

The evidence and staff studies show that practically all modern wage structures provide for paid holidays, night shift premium pay, and for premium pay for service performed on the sixth and seventh consecutive days of service. The Commission has almost entirely ignored these materials. Paid holidays have been granted only to regularly assigned yard and local freight employees. Night differential pay and weekend penalty pay have been denied entirely. These proposals on the part of the employees should have been beyond controversy inasmuch as the evidence plainly called for extension of such universally standard working conditions to all operating employees.

The evidence and the studies available to the Commission likewise show an evolving development toward shorter working hours in many industries, particularly in other completely organized industries. They show that such reductions for other workers have been accompanied by wage adjustments maintaining earnings. The majority report has recommended some reductions in the 16-hour statutory day for these employees, but only on a very gradual basis. Suggestions for future reductions from 31-day months and 7-day weeks are not accompanied by suggestions for maintenance of take-home pay; in fact such maintenance is negated by the recommendations made. Again the majority has refused to follow the signals the evidence establishes as guides.

Almost, if not entirely, without exception the recommendations of the Commission dealing with the wage structure of the employees are impractical. The recommendations neither adhere to the present wage system, nor do they stay within the issues made by the proposals of the parties. Rather, the recommended wage structure embarks on uncharted seas, to end up only Heaven knows where. Too much is at stake in this industry to permit the experimentation of which the majority is guilty.

I am aware that Commissioner Zimmerman is preparing a report to be submitted directly to the President of the United States analyzing the many ways in which the majority report would, if placed in effect, destroy the pay scales, working conditions, and collective bargaining of the railroad industry. I am in accord with Commissioner Zimmerman's proposition that the report of this Commission should

be attacked vigorously for its evil implications, not only for railroad operating employees, but for all labor.

In conclusion, let it be clear that the report of this Commission neither hews to the issues nor finds support in the record of proceedings. What is more significant ultimately, however, is that it fails tragically to provide a basis for disposing of the underlying labor dispute. There is every manifestation that the thinking which spawned the majority report was opaque to the purposes of the Commission's creation.

I dissent to the report.

Consist of Cases

There is a discrepancy in the Commission's report Chapter 6 of the report dealing with the new railroad (Continued) in road and

and the York County (Maine) Case (Continued)

The majority of the Commission are of the opinion that there was no agreement in 1907 and York County (Maine) Case (Continued) in road and

The Commission's view of the majority's opinion, in the majority's opinion of the majority upon which it is based on the

DISSENTING REPORT OF COMMISSIONERS H. F. SITES AND S. W. HOLLIDAY

We dissent from the findings, conclusions, and recommendations of the majority of the Commission.

Inasmuch as the first written draft of the Report was furnished to us on February 13, 1962, supplemented by an additional portion delivered to us on February 14, and by revisions delivered to us on February 19 and February 22, time has not permitted us to prepare an extensive presentation of our views of the report for filing by the deadline of 3 p.m. on February 23, 1962.

We will discuss only certain divisions of the report which we deem particularly vital to the interests of train and yard service employees. Our discussion will use the same chapter headings and follow the same order as used in the report of the majority. For brevity the majority of the Commission will sometimes be referred to as "the Commission".

Consist of Crews

This subject is discussed by the Commission in part II chapter 6 of the report dealing with the use of brakemen (trainmen) in road and yard crews.

Road and Yard Crews (Other Than Engine Service)

The majority of the Commission express their opinion that there is some overmanning in road and yard service but say that they don't know how much it is or precisely where it exists. After a year of hearings and investigation it is to be regretted that the Commission reached the point of expressing conclusions on matters vital to the employees on the basis of evidence so inadequate as to produce only the uncertainty of a suspicion which the majority can neither define nor identify.

The Commission does, with commendable candor, indicate the unsatisfactory character of the evidence upon which it based its conclusion. It states that the evidence was largely "opinion" and that very little of it was "of direct probative value." It also refers to an illustration of a conflict of opinion among the carrier witnesses. It fails, however, to say that throughout the carrier presentation of this issue the carriers repeatedly admitted that various operating experts in management are in disagreement as to the appropriate

crew size even under identical operating conditions. The fact of this disagreement among carrier operating experts was expressed repeatedly and dramatically. This disagreement among carrier operating experts is so significant that it deserved more than a passing and abbreviated reference in the report of the Commission. It should have cautioned the Commission to avoid speculation in an issue fraught with considerations so complex as to produce disagreement even among carrier operating experts.

The operation of trains is a highly complex business. The number of trainmen required for safety and efficiency involves an evaluation of a myriad of complex operating rules under constantly variable operating conditions. In an issue so complex that it has produced repeated disagreement even among operating experts in management it is not surprising that it has at times produced disagreement between management and the employees. It is surprising, however, that the Commission determined to inject a speculation into the midst of an issue fraught with complexity and characterized by disagreement even within the ranks of management.

The issue is a narrow one. As the Commission recognized, the most typical and generally accepted crew consist, outside of passenger service, is a conductor and two brakemen. It is only rarely that crew consist rules, negotiated between the parties, require more than two brakemen in either road or yard crews, and when three are required it is usually because of switching problems in local freight service or at some yard locations. Even the carriers conceded in these proceedings that on many of these crews they would use three brakemen of their own volition.

While negotiated crew consist rules ordinarily do not require more than two brakemen, a third brakeman is sometimes required by statute in a few State "full crew" laws. The Commission seeks to draw an unfavorable inference of excess manpower by comparing the crew size required by *negotiated consist rules* with the crew size required by some *State full crew laws*. The Commission does not explain just how a comparison between a negotiated consist rule and a State law constitutes, as it says, "inferential evidence" that "the parties themselves" recognize that "this difference in manpower requirements is not always warranted." Neither the carriers nor the organizations are a "party" to a State law. The comparison is not an apt one nor does it indicate that excess manpower has been forced on the carriers by the employees. If the difference indicates anything, it would seem to indicate that if present manpower requirements are not always warranted it is not because of negotiated crew consist rules.

Public laws are doubtless motivated by reasons somewhat different from those motivating the parties in collective bargaining. The State

laws are doubtless designed largely for the protection of the general public, particularly in relation to long trains, public highways, and municipal street crossings. In addition, many State laws or municipal ordinances also prohibit the blocking of public crossings for more than 5 or 10 minutes. It is the duty of the brakeman to protect all blocked crossings against vehicular and pedestrian traffic, and to cut the cars of the train so as to open such crossings if blocked more than a short period of time. A crew which is undermanned increases the public inconvenience and hazard at public crossings. If the State law requires a larger crew than that normally required by negotiated crew consist rules it presumably expresses the interest of the State in the safety and convenience of the general public and stems from comprehensive considerations of the public policy of a particular State.

While it was admitted by the carriers in the course of these proceedings that the wisdom of these State laws was not within the issues before this Commission, the carriers nevertheless frankly asked the Commission to condemn such laws in order to provide material to the carriers in seeking to influence State legislatures to repeal them. The Commission's comments regarding State full crew laws were solicited by the carriers and are obviously intended as gratuitous advice to State legislatures. We suggest that they are inappropriate in the circumstances and not authorized by the issues submitted to the Commission either by agreement between the parties or by the Executive Order of the President establishing the Commission.

The Commission suggests that it will be useful to weigh the merits of any future proposal for a change in crew size by comparing such a proposal to the typical and generally accepted consist of a conductor and two brakemen. Apparently the Commission does not mean to infer that "unwarranted manpower" exists in two-brakeman crews. The point emphasizes the fact that in speculating on the possible existence of "unwarranted manpower" the Commission has evidently engaged in a criticism of State full crew laws requiring three brakemen rather than in a criticism of negotiated crew consist rules which ordinarily and typically require two brakemen. In other words, the Commission has directed its attention to a matter not within its jurisdiction but has veiled this fact by mixing a discussion of negotiated crew consist rules together with a discussion of full crew laws as though they were one and the same.

In so far as negotiated consist rules are involved the Commission does recognize that "the employees have a legitimate collective bargaining interest in the matter of crew consist." The majority do not indicate the nature of this interest other than to suggest the criteria of "safety" and the "onerous" nature of the work. Since the matter of crew size has been the subject of collective bargaining in the railroad

industry for well over a half-century it is important, we believe, that the interest of the employees be briefly described.

The relationship of crew size to safety of operations has been recognized throughout this proceeding. It is not disputed that railroading is a hazardous occupation and that railroad employees have a direct and immediate interest in their own personal safety. It is further apparent that not all management is in accord on the relative degree of safety that should be provided in train operation. Some would take more chances than others.

There are undoubtedly some railroads which would of their own volition provide a crew size reasonably consonant with safety of operations, independent of any requirement arising out of a negotiated crew consist rule. Crew consist rules do not now exist on all railroads and on many railroads such rules apply only to particular services, as, for example, yard service, and do not apply in other service. Several large railroads have no crew consist rules but have generally maintained the standard crew size of a conductor and two brakemen. In this proceeding Mr. William White, president of the Delaware and Hudson railroad, *which does not have crew consist rules*, testified:

I will repeat that we have never hesitated to use as many men on trains and yard engines as may be required for the safety and efficiency of operations. For example, in 1959 the *average* yard crew employed on the Delaware & Hudson Railroad had 2.38 trainmen in addition to a yard conductor, and many road freight crews had *three* trainmen in addition to a conductor, regardless of the state in which operated and regardless of the number of cars being hauled. * * * This clearly points up the fact that entirely of our own volition we use as many trainmen as are needed in the interests of safety, service, and efficiency. (Emphasis supplied.)

It was Mr. White who also expressed the view, quoted in the majority report, that:

Not very many freight trains or yard crews would be operated with a crew consisting of less than an engineman, a conductor and two trainmen.

While undoubtedly there are railroads where the management, as stated by Mr. White, has never hesitated to use as many employees as may be required for the safety of operations, there are other railroads of an entirely different cast of mind. Railroad managements are not equally safety conscious. The history of railroading is replete with the struggles of railroad operating employees to obtain improvement in safety standards as against the opposition of at least some in railroad management.

This difference in attitude of carrier managements is illustrated by some of the areas of carrier agreement and disagreement among carrier witnesses reflected in this proceeding. There is no disagreement concerning the head brakeman. The carrier witnesses repeatedly

said that they proposed to retain him as the member of the train crew who was said to perform the most physical labor. The carriers testified: (Tr. 8051-52):

It is the head brakeman on freight trains that does most of the coupling and uncoupling of cars and air hoses, throwing switches, setting and releasing handbrakes, giving hand signals to the engineer, and other duties in connection with the setting out and picking up of cars.

Practically all trains in over the road service carry a head brakeman who performs the duties described above and other duties. Such trains also carry a rear brakeman (flagman) who provides flag protection during the operation of the train and performs other duties. A modern day freight train takes a mile or more to stop and the rear brakeman must frequently go back more than a mile to provide flag protection against following trains. The flagging rules on most railroads are extensive and have long been regarded as among the most important safety rules in the Standard Code of Operating Rules. For example, one carrier management has said:

Violation of (flagging) Rules 93 and 99 have resulted in more accidents than any other in the Book * * *. Many serious and in some cases fatal accidents have occurred on our own and other railroads due to failure to comply with Rule 99.

Notwithstanding the importance of flagging from the standpoint of safety a few carrier witnesses, contradicted by others, suggested that signaling systems could be used to eliminate flagging. These suggestions were scattered, brief, and vague. Signaling devices, manual, automatic, or electronic, have long been in use in railroading. For reasons of weather, nighttime obscurity, and other reasons, many train wrecks have occurred by reason of the failure or inability of the engineer of a following train to see or heed the signal in time to avoid a wreck. Such signal systems are subject to mechanical failure or to human failure by a distant dispatcher or operator. Consequently the railroads require flagging as a safety measure so that a flagman may attract the attention of a crew of a following train by the noise of exploding torpedoes and the presence of a human beside the track giving alarm signals even though a signaling system may or may not be observed by reason of weather, nighttime, mechanical, or human failure, or by reason of some other cause.

The suggestion of a few carrier witnesses that the flagman might be eliminated illustrates the tendency of some to take more chances than others. Actually the hazard implicit in the suggestion is only partially outlined in the discussion thus far. If the flagman were to be eliminated the freight conductor would be left alone in the caboose. His hazard of injury from unexpected slack action would immediately

increase. As a safety measure the employees in the caboose are instructed to move about as little as possible while a freight train is in motion. Some movement about the caboose and in and out of the cupola is essential since the employees on the rear of the train are required to keep a constant watch of both sides of the train ahead for hot boxes, which may cause burned off journals; look out for dragging equipment or other failures; look out for signals from way side employees; and observe the condition of the track behind for defects or signs of dragging equipment. An employee alone in the caboose in order to watch both sides of the train and maintain other lookout functions, would be forced to increase his movements in and about the caboose and thereby increase his risk of injury from unexpected slack action which is frequent and commonplace and often very severe as a result of emergency brake application. Each year numerous employees suffer injury as a result of slack action. Many of these injuries are serious and it is not uncommon for an employee in the caboose to be knocked unconscious from unexpected slack action. Long ago, when trains were shorter, some carrier managements announced that as a matter of safety there should always be two employees in the caboose. Now other carrier managements are suggesting abandonment of this aspect of safety despite the fact that trains of up to 300 cars are not uncommon today.

The foregoing indicates only some of the safety considerations which motivate employees to bargain for crew consist rules requiring the use of a minimum crew of a conductor and two brakemen.

Personal hazard is not the only hazard involved in the issue of crew size. Fewer employees on the crew increase the chance that a defect in the train or track may be overlooked; a switch may be left out of position, or some other operating or safety rule may be overlooked. Railroad operating employees are subject to intricate and complex operating rules in the operation of trains and their performance is strictly enforced by discipline or discharge. The conductor, who is the supervisory officer in charge of the crew, is often disciplined or discharged for failure of others on the crew to perform in accord with operating rules. The carriers have insisted, and some boards have sustained them, that it is no excuse for the conductor to show that the violation occurred out of his presence while he was engaged in other duties. In view of disciplinary consequences, which may include dismissal after years of service, railroad operating employees have a direct interest in the assignment of at least a minimum number in the crew for reasonable assurance of compliance with all operating and safety rules.

Crew consist rules also relate to job regularity. Rules which require a minimum fixed crew size are the antithesis of a day-to-day

determination of crew size dependent on the divergent views of carrier officers. So long as assignments are in existence the consist rules provide a measure of job regularity. Otherwise, a constant shuffling process would occur. Bulletin and seniority rules would become meaningless. Irregularity of work would become even more pronounced than it now is in an industry which is characterized by the employment irregularity of many employees.

The size of the crew is directly related to the hours of service on a trip. Some trains, particularly in local freight service, involve a considerable amount of switching and protection of public street and highway crossings. Delay may involve trouble with local authorities, including arrest and fines which the employees are frequently required to pay out of their own pockets. Local freight service is ordinarily a slow operation involving long hours on duty. Frequently the carriers, of their own volition, add a third brakeman to some crews in order to expedite the movement. Sometimes the employees bargain for a consist rule which will require the addition of the third brakeman. The interest of the employees in bargaining for a third brakeman in local freight service in order to shorten their hours and avoid trouble with local traffic authorities is obvious. It is for these and other reasons that most consist rules requiring a third brakeman are found in local freight service.

The Commission has recognized the bargaining interest of the employees in respect to the consist of the crew but recommends that any dispute ultimately be resolved by a special tribunal. We submit that the recommendation is not justified by the record. Furthermore, we submit that an issue involving so many complex considerations of operating requirements should be left to negotiations by those familiar with them. It is no reflection on the capabilities of public members of special tribunals to suggest that an issue involving complex considerations of railroad operation is better left to those familiar with it. If railroad supervisory operating experts can spend a lifetime in this business and still disagree, it is not to be supposed that a public member of a special tribunal will become an expert in the course of a few weeks of hearings. This Commission after a year of hearings and investigation has been unable to define precisely or identify so-called over manning except to imply that some third brakemen required by state full crew laws may not be needed.

Whether a special tribunal offers an acceptable mode of decision depends, in part, on whether the procedure is abused. It is subject to abuse. The carriers, if so inclined, could flood a special tribunal with requests for reductions. They take no risk, since they can always later unilaterally add the employee to the crew of their own volition. If they are successful they would achieve in large measure the uni-

lateral discretion which they sought in this proceeding and which the Commission purports to reject.

The carriers have complete control over the regulation of the work practices of any crew assignment. In a given period the carrier could so regulate and lighten the work of a particular crew during the period under consideration by a special tribunal so as to lend credence to its proposal for a crew reduction. If successful, it then can promptly increase the workload and apply the same process to the next crew assignment under attack. Work loads normally vary from day to day and it only takes a little forethought to accomplish the results outlined above.

Special tribunals do not necessarily provide a fair and equitable means of determination of issues of this nature, not only because of the reasons we have discussed above, but for other reasons. By its very nature it is management that keeps detailed records of operations of the kind no labor organization is equipped to maintain. Even if it attempted to maintain detailed records of railroad operations on all railroads, division by division, it would not have the means or authority to collect the information. Furthermore, there is no procedure by which the employees can demand that management produce all relevant records and data for use before special tribunals. Management keeps the data in its possession and interprets them for presentation purposes as it pleases. The employees must present such rebuttal as they can prepare on short notice and from such other sources of information as may be available to them.

We have criticized the procedures used in the hearings in the proceedings of this Commission and many of our comments are applicable to the procedure now recommended by the Commission. Our protests were ignored in the report of the Commission. We submit that the matter deserved more serious attention than it received. Unless fundamental changes are made in the procedures of special tribunals, the employees will continue to view the fairness of their procedures with distrust.

In this proceeding the Commission, after a year of hearings and investigation, has been unable to identify any substantial area of over-manning attributable to negotiated crew consist rules. If the problem isn't large enough to be identified, we submit that a legitimate area of collective bargaining should not have been relegated to a case-by-case review by a "special tribunal," with the expense on employees attendant thereto, and with the very real possibility that the procedure may be abused.

If the procedure recommended by the Commission should be abused, the inequity would be compounded by the suggested 5-year moratorium

period. Employees should not be saddled with any inequity or abuse for this period of time while helpless to seek correction.

In Item 1 of the recommendations of the Commission the statement appears that "any carrier or an organization may conduct a survey for the purpose of determining what changes in crew consist it wishes to propose." It could be assumed reasonably that such survey would not encompass all crews on a seniority district. On the basis of such an assumption, the survey should be confined to unusual crew assignments where job content and safety requirements are alleged to be above or below accepted crew consist standards. Otherwise, the Carriers could conduct surveys and compel the employees to defend the consist of many crews on a seniority district each year. In the discussion of the Commission the statement appears "the most typical and generally accepted crew consist, outside of passenger service, is a conductor (foreman) and two brakemen (helpers)." It thus appears that the Commission intended only to provide a procedure designed to fit anomalous circumstances, but failed to so specify in its recommendations.

Manning of Motor Cars and Self-Propelled Machines

The recommendations on this issue appear to be in conflict with the reasoning of the Commission that led to them. For example, the following statement appears in the report immediately preceding the recommendations:

We believe, however, that under some circumstances and conditions, operating craft personnel have a useful and necessary function to perform, and can properly claim to have some manning rights consistent with their normal craft jurisdiction. We think that suitable criteria can and should be established for the identification of these circumstances and conditions in which operating personnel should continue to be used. (Emphasis supplied.)

It is difficult to resolve this statement with a recommendation which gives the Carriers unilateral authority to eliminate all operating personnel on the various types of self-propelled equipment operated on the rails.

The Commission recognizes that operating employees perform a useful and necessary function under some circumstances and conditions and can properly claim some manning rights on these machines. In an area as wide and diversified in application, criteria and circumstances as this one we submit that it is highly illogical and arbitrary to recognize the rights and collective bargaining interests of operating employees and then recommend that these same interests be disregarded and the matter be left to unilateral managerial prerogative.

It is significant that the various types of machines and vehicles comprehended in the Carrier proposal are "on the track machines"

many of which are equipped to, and frequently do handle, cars. They are essentially work trains performing work train service. They must be operated in the light of the operating rules. Their operation is the work of operating employees and it is inequitable and improper to suggest, as the report does, that the operating employees relinquish their jobs to other groups of employees.

There is no question that many of the machines and equipment, especially those used in maintenance of way work, represent substantial recent advances in the technology of railroad maintenance. These machines have brought about a continuing job attrition, especially in the non-operating crafts, because of the automation inherent in them. However, the functions of the operating crafts in the operation of these machines have not changed. There has been no basic change in the duties to be performed by operating personnel despite the technological advance of the machine itself or the functions it performs with respect to the work for which it was designed.

Operating employees have never taken the position that they should be used on every piece of equipment that operates on rails. Certain well established concepts have been developed over the years which provide the suitable criteria referred to by the Commission. While the machines that come within the purview of these concepts may not fulfill the image that the Commission may have become accustomed to recognize as a train, the fact is that these machines are work trains engaged in work service, and the right of operating employees to man them in connection with this phase of the service is indisputable.

It would appear that the Commission failed to give due consideration to the fact that the operation of these machines directly affect the safety of operating employees on other trains. Many of these machines do not actuate automatic signals and others are operated by train orders. Unless these machines are operated by operating employees trained in operating rules, and unless flag protection is afforded, these machines represent an ever present hazard to all trains running over the track on which they are being used.

If the Commission believed there was a necessity for suitable criteria to determine when operating employees should be used, it should have been so devised. All this could have been done by a mature consideration of this issue. Certainly, if the consideration this issue warrants had been given to it, a recommendation such as the one rendered by the majority would not have been forthcoming.

Conclusion

For the reasons outlined above we submit that the recommendations of the Commission on the crew consist issue are ill advised and unjustified.

Compensation

This subject is discussed by the Commission in part IV of the report, chapters 8, 9, and 10, dealing with the wage structure of road and yard service employees.

The Wage Structure Issue

The Commission has recognized the problems in the wage structure but admittedly has not had time to develop solutions. The recommendations of the majority obviously were hastily conceived without mature reflection and deliberation. They create new problems. They are incomplete in major areas. While some few principles, such as acceptance of the 8-hour overtime rule in freight service, are laudable, the overall complex of the wage structure is generally disrupted by the recommendations in a manner highly unfavorable to the employees. The result will be an intense disappointment to the employees. In the light of the time, effort and expense that have been devoted to this project it is a source of deep regret to find the wage structure left in this garbled condition. From the standpoint of the employees it is a tragedy.

The wage structure issue before the Commission embraced all of the requests of the parties to modernize the pay rules applicable to the employees, including the number of days and hours they work, the miles they run, their pay rates and guarantees, their basis of compensation for work outside of regular duties, for work at night, for holidays, and for reimbursement for expense outlays incurred in layovers away from home. Both railroad management and their employees recognized the need to change the present system and both made extensive proposals. Since the present pay structure is over 40 years old, both parties proposed very substantial changes. It was not unreasonable to expect that, within the scope of the present system and the changes proposed by the two parties, the Commission could find a common meeting ground of equity which could serve, at least, as a starting point for fruitful negotiations. Unfortunately, this has not happened. The Commission's recommendations followed neither the present system, nor did they stay within the proposals of the parties. The recommended wage structure wanders into a new wilderness—far away from the existing system—and unguided by the standards proposed or by the facts brought to light by the many studies which the Commission itself sponsored.

We believe that the studies made by unbiased experts employed by the Commission would have produced more mature results if time had been available to have had such studies reviewed and utilized by the Commissioners as basis for their findings and recommendations.

Unfortunately, this did not happen. Having spent much time and money for a thorough factual review of the relevant factors, the Commissioners were forced by lack of time to shelve the studies and hastily pick a solution at random.

Standards to Guide the Commission's Work

It was reasonable to expect that the Commission would follow some standards. The Agreement of October 17, 1960 (which requested the President to establish the Commission) mentioned one guidepost—the principles as propounded in the recommendations of Emergency Board No. 109. A second general standard arose from the obvious need to “modernize” the wage structure to make it conform with modern developments in other industries and with the results of technological progress in the railroad industry. The third standard to be applied in constructing a new wage system is simplicity and intelligibility which are essentially keys to practicability.

In its introduction to the wage structure issues, the Commission itself recognized that “The methods of compensation of railroad employees . . . are probably the most complicated of any major industry in the United States.” It follows that changes, which could simplify the wage structure without creating serious unbalances and inequities, would be welcome to all.

The Commission, therefore, had three standards, or groups of standards, to guide it: (1) the procedural and substantive standards specifically mentioned by Emergency Board 109; (2) modern developments in other industries; and (3) simplification. For the most part, the Commission completely ignored these principles.

We examine the recommendations made by the Commission, in the more important sections of the wage structure issues, in the light of the three standards to which we have referred.

Days of Service

Freight service employees today have a 7-day week and a 30-day month. If they work every day they do so at straight time, since overtime is not based on the number of days of service, consecutive or otherwise. The employees proposed a 6-day week (or a 26-day month) in through freight and through passenger service, and a 5-day week (or a 22-day month) in local freight, yard, and short turnaround passenger service. The proposal, of course, contemplated maintenance of weekly and monthly earnings with the reductions in days of service.

The studies made by the Commission and the evidence introduced in the proceeding demonstrated clearly that a 5-day week generally prevails in American industry and that most workers get time and one-half for service on Saturdays, or on the sixth consecutive day of

service, and double time for Sunday or seventh day service. Nonoperating railway employees have a 5-day week, with time and one-half for service on the sixth and seventh days.

Other workers achieved the shorter workweek, with maintenance of weekly or monthly pay, years ago. The record, in this respect, is also complete for other railroad workers. As Carrier Exhibit 7 showed (pages 101-116 and 250) the principal 7-day class among the nonoperating workers (consisting of telegraphers' levermen, tower employees, and station agents) were granted a 6-day week in 1918. Their daily rates were adjusted by multiplying them by 365 and dividing by 306—thus compensating them for 6 days of service with the same pay previously received for 7. These same employees and other nonoperating workers obtained the 5-day week in 1949—following recommendations of Emergency Board No. 66—again with full maintenance of weekly pay in the changeover.

The present 7-day week is not just a theoretical concept for the freight and the yard employees before the Commission. Many of these employees were shown by the Commission's own studies to be working 7 full days per week.

It might be thought that establishment of a 6-day week, with maintenance of take-home pay, for through passenger and through freight service classes, would be a matter of course in a modernization movement in 1962. Not so for the Commission, however. We quote the following from their recommendations:

We recommend that the parties adopt the following priorities in regard to proposals relating to changes in the workweek, workmonth and workday. It has been recommended that effective July 1, 1962, there be a reduction in the maximum hours on continuous duty and an hour's limitation on a weekly or monthly basis. It is further recommended that the parties give consideration to a gradual reduction in the workweek from 6 or 7 days to 5 days in local freight and to a gradual reduction in the workmonth from 30 days to 28 days in other classes of road service. These changes should be associated with *some* adjustment—*although not a proportionate adjustment*—in the basic daily rates.

While the Commission suggests that the parties "give consideration" to a reduction in days of service below 7 per week and 30 per month, it destroys implementation of the idea by saying that the change should not be accompanied by "proportionate adjustments," that is, with a maintenance of take-home pay. The Commission thus departs from every previous precedent in railway labor history and treats these employees differently than the treatment that has been received by other employees in the railroad industry.

Related to this impossible finding is a further recommendation endorsing a maximum 52-hour week and a 208-hour month, but with no overtime even after these archaic standards. When coupled with

other recommendations, this particular provision will operate to lengthen the hours of many classes, since it will stand as an invitation to increase the time worked by any employees now working shorter hours. In other words—as has often happened in other similar situations—the maximum becomes the minimum. Clearly, the whole attitude of the Commission in this area is based on standards which may have been appropriate in the year 1900 but certainly are not appropriate in 1962.

Hours and Miles of Service and Pay

The present rules for freight service provide a basic day of 8 hours or 100 miles; overtime becomes applicable only after an indefinite number of hours, determined by dividing the miles actually run by the standard speed of 12.5 miles an hour, but never until after 8 hours per day and often not before 10, 12, 14 or more hours. Miles in excess of 100 are paid for at straight time rates.

The employees requested a 6-hour day in through freight service; and a 7-hour day in local freight service which would have resulted in a 19.2 miles per hour speed basis, with hourly overtime accruing after the new standard hours of 6 and 7 respectively. The Carriers proposed retention of an 8-hour overtime rule by increasing the miles per day to 160 and adopting a speed-basis overtime formula based on 20 miles per hour.

The Commission conducted elaborate studies of the present earnings of the employees, their hours of service, the miles in their assignments, their speed of operations, and many related factors. These studies showed, among many things, that the average through freight employee presently worked about 6 hours a day—very close to the standard proposed by the employees. The studies showed, however, that many employees—particularly in local freight service (where a 7-hour day had been proposed), worked extraordinarily long hours, ranging up to 16 hours per day and even sometimes exceeding that statutory limit established by the Hours of Service Law in 1907. Although the studies showed that the 8-hour day was still the general standard for most workers in other industries, they evidenced some shortening of daily hours in many industries, including well-organized groups in construction, printing, clothing, rubber, and transportation—particularly airline operating employees who have no standard day but work a maximum of 85 hours per month.

Again, the Commission ignored most of the evidence including that in its own studies. In addition, the Commission wandered far from the present pay system and the proposals of the parties. Its key recommendations include the following for freight service:

(a) Retention of the 100-mile day, but with mileage rates to be reduced to *one-half* the present through freight rates for miles between 100 and 160, and to *three-quarters* the present through freight rates after 160.

(b) Retention of the 8-hour day, but abolishing the speed basis of overtime, and allowing miles (at the reduced rates) in addition to hourly pay for runs of over 100 miles.

(c) On runs of 100 miles or less, hourly components alone shall produce not less than 8 hours' pay; after 100 miles, both hours and miles together are added to produce not less than applicable basic daily rates.

The pay system thus provided has six possible combinations of pay elements:

(1) Employees working 8 hours or less and running 100 miles or less will get a day's pay, which does not change from the present system;

(2) Employees working 8 hours or less and between 100 and 160 miles will get paid for *actual* hours worked plus miles run over 100 at half the present through freight mileage rates, subject to the guarantee of the basic daily rates;

(3) Employees working 8 hours or less and 160 miles or more will get *actual* hours worked plus 60 miles at one-half the present through freight mileage rates and miles in excess of 160 at three-quarters of the present through freight mileage rates—subject to the guarantee of the basic daily rates;

(4) Employees working over 8 hours, but not beyond 100 miles, will get 8 hours' pay plus time and one-half for hours in excess of 8 or the same as they get under the present system;

(5) Employees working over 8 hours and between 100 and 160 miles will get 8 hours' pay plus overtime at time and one-half for all hours in excess of 8, plus miles in excess of 100 at half the present through freight rate;

(6) Employees working over 8 hours and more than 160 miles will receive 8 hours' pay, plus time and one-half for all hours after 8, plus 60 miles at half the present through freight rate, plus miles in excess of 160 at three-quarters the present through freight rate.

The present system is complex but is simplicity itself in comparison to that now proposed.

The effect of this complex wage system on the employees and the railways will be widely variable. All freight employees running 100 miles or less, regardless of hours worked, will receive a small wage increase. All employees now working less than 8 hours but running over 100 miles will take a pay cut (except to the minor extent that it

may be recovered in the small wage rate adjustments recommended). Those now working more than 8 hours will take either a pay cut or get a pay increase depending on whether the cut in mileage pay is offset by increased overtime. Studies made by the Commission reveal approximately the number of employees in each of these three categories. We will use through freight conductors as an example:

Running 100 miles or less—would receive increased compensation	234
Running over 100 miles, but working 8 hours or less—virtually all would suffer a wage cut of varying amounts.....	741
Running over 100 miles and working more than 8 hours—some to be cut, some to be increased.....	100
Total in study	1,075

Thus, approximately two-thirds of the through freight conductors would take pay cuts if this recommendation were to be adopted. Other classes of road operating employees would be similarly affected.

Among the standards supposedly to be considered by this Commission are the recommendations of Emergency Board 109. That Board stated:

The objective of the commission should be to propose for the consideration of Carriers and the labor organizations a revised and modernized wage rate structure for the operating classifications. *The objective is not to change the general level of rates but to reorganize the structure and pay rules.*

It has been the experience of industry generally that improved wage rate structures pay for themselves, while *they may result in some initial rise in average earnings.* In these operating classifications it should be possible to reduce average labor costs per ton-mile and per passenger-mile and increase some earnings.

Industries which have revised their wage structures have invariably adopted a "red circle" or "incumbent" rule, under which no present employee by virtue of the wage rate revision suffers a loss in wage rate without adequate compensation. There may be some technical problems in applying literally this principle to the railroads in view of the operation of the seniority system under which employees may work in several different classifications from day to day, and in view of the variation in pay rules which create variations in earnings. *The practical application of this principle is needed to assure the full cooperation of the individual employees in the wage structure revision program.*

These key principles mean that, overall, there shall not be any reduction in compensation and that in the exceptional circumstances where individuals may be hurt, the "red circle" system will protect present incumbents of positions from the effects of any individual reductions. The "red circle" system is obviously intended for excep-

tional circumstances—not for the bulk of the employee group. But, as we have pointed out above, a majority of the employees in through freight service would receive a cut in their pay. Knowing this, the Commission arbitrarily discarded the “red circle” principle which the Report of Emergency Board No. 109 said had been a basic principle in wage structure revisions in other industries. In this regard the Commission said:

A great deal of time has been devoted to trying to find a suitable means of applying the “red circle” principle to railroad operating employees. While none has been found, a number of considerations suggest that the problem is quite different in the railroad industry than in industry generally. The senior employees may use their seniority to select other runs or other classes of service which have been made more attractive by virtue of our recommendations. A number of senior employees may be expected to retire leaving opportunities for promotions to preferred runs and assignments.

We do not understand how the railway industry differs so greatly from other industries in this respect. Seniority and bidding rights are common in many industries in which, as Emergency Board 109 stated, the “red circle” rule has been “invariably” applied.

The Commissioners apparently think they are justifying a drastic wage cut for the majority of through freight employees and many local freight and through passenger employees because of certain benefits they say will accrue to some local freight employees on short runs and to the yard service classes. In this connection, they state:

The recommendations were designed to increase the relative compensation of yard, local freight, and miscellaneous services and to decrease the relative compensation of through freight and passenger service.

Our recommendations would yield increases in earnings to about 75% of the operating employees. Substantially all yard and local freight employees would receive higher rates. Similarly, road service employees on runs under 100 miles (150 in passenger train service) and those who work long hours in all classes of service will benefit from the higher pay rates and overtime provisions in the recommendations.

The statement that the recommendation would yield increases in earnings to about 75 percent of the operating employees is subject to misconception. Almost half of the employees receiving increases are yard employees. The adjustments for yard service employees are unquestionably helpful, although they do not make up for the losses these employees incurred in past wage movements and by conversion to the 5-day week.

In road service large numbers of employees will take a pay cut. For example, employees in through freight train service, which is the largest road train service class, would receive an approximate 15 percent pay cut as a group. Similarly the pay of employees in

through passenger train service will be substantially reduced for virtually all of these employees, since the Commission's study reveals the average through passenger run to be approximately 290 miles.

It is clear that the Commission avoided any attempt to conform to the principles of Emergency Board No. 109; that it has made little effort to provide the 6-day or the 5-day week, or other "modern" standards accepted for other workers; and that the system now proposed is certainly not characterized by simplicity. Chaos would more aptly describe the results of this proceeding in so far as the wage structure is concerned.

It appears that the task of arriving at a workable pay system turned out to be too much of a job in the time allotted. In effect, the Commission confessed the shortcomings of its recommendations and lack of time in the final paragraphs of the wage structure section wherein it stated:

There has not been enough consensus, time and perhaps data to deal fully with all these matters, and the magnitude of adjustments in the wage structure required in this industry exceed the normal cost allowances for such structural adjustments in other industries. We are of the view that the parties should continue to work diligently. . . .

Apparently, when faced with the need to recommend something that would be useful and constructive, the public Commissioners found themselves hampered by lack of time to deal with a complex matter and left it all to be worked out by the parties. We had hoped for something far more constructive and useful in this long, costly and unusual proceeding.

Passenger Service

This subject need not be discussed at length. The recommendations may be succinctly summarized as proposing drastic cuts in pay of virtually all employees engaged in through passenger train service. Here again the Commission disregarded the "red circle" principle so invariably used in wage structure revisions. This again illustrates the fact that the recommendations of the Commission fall far short of offering an acceptable guide to revision of the wage structure.

In commuter and short turnaround passenger service the Commission recommended that the service be placed entirely on a daily pay basis but omitted recommending other pay rules common to employees who are paid on a daily basis such as the 5-day week and paid holiday rules, etc. Obviously, the Commission attempted to overcome this deficiency by suggesting that pay scales and other pay rules be negotiated separate and apart from negotiations on other matters.

Guarantees

Guarantees were a problem because, in the railway industry, the employees who most need guarantees don't have them; that is, the employees in extra and irregular service, who may be subject to call for service 365 days every year, and 24 hours every day, have no assurance whatever of earnings sufficient to keep them alive or to support their families.

The Commission simply ignored these individuals—and awarded guarantees only to those classes of employees in "regularly assigned yard, local freight and miscellaneous services on daily basis." Again, it must be wondered what use the Commission made of the studies it sponsored with reference to the working conditions in other industries. These studies showed universal acceptance of the need for guarantees to extra or standby workers whose presence in the industry is not casual, but is essential to continued operations, given the natural uncertainties of life, health, weather conditions, and any number of additional exigencies which arise from day to day.

Arbitraries and Special Allowances

The Commission has recommended that arbitraries paid for initial and final terminal and intermediate yard switching be eliminated but that other arbitraries be continued. To understand this recommendation, one must know how these special payments apply. We will take but two examples to illustrate the problem created in this area by the recommendations of the Commission:

Suppose a road crew reports and is instructed to do some yard switching before leaving on its run. This switching takes 2 hours' time. Under the recommendations of the Commission the crew members would receive no pay other than that which would accrue to them on their run and which would be earned by them even if the 2 hours' switching had not been required.

Suppose another crew, on the same day, goes out on a similar run and is delayed for 2 hours—sits and does nothing whatever for a period of time before proceeding. Here, the crew members will, under the recommendations, start to draw additional pay after 1¼ hours, in addition to their pay for the run. Is it just and fair to pay the crew members for waiting time but unjust to pay them for actual switching work assigned to them? The anomaly is further emphasized by the fact that if the crew is waiting at a terminal it can be ordered to switch one car and the carriers can then claim that the entire 2 hours should be treated as unpaid switching time.

The present system recognizes that there are conditions which are not covered by the general compensation system and must be met

through additional payments. The Commission's studies show this to be common practice in other industries—and particularly in other transportation industries where the mileage basis of pay is used. However, having ignored these studies elsewhere, the Commission evidently saw no reason to make an exception here, and recommended discontinuance of some of these special payments without any inquiry into their merits.

Fringe Benefits

The employees proposed paid holidays and premium pay for night time service and that they be reimbursed for expenses incurred when away from home. The Commission's studies clearly showed that these practices were not only common in other industries but were accepted overwhelmingly for a vast majority of American workers. The studies showed that about 95 percent of American workers get paid holidays; that 76.0 percent get premium pay for working nights (and most of those not getting night pay are never required to work nights); they showed that where expenses are incurred at away-from-home terminals as in other comparable transportation operations, the employees are made whole for such outlays.

But again, the Commission ignored its studies, although it found time to search out some small groups, which did not have the proposed benefits, in an attempt to justify its denial of such benefits in the railroad industry. The nearly universal practice of paying for holidays apparently induced the Commission to allow them only to *regularly* assigned yard and local freight employees—but not to extra employees in these classes, or to through freight and the passenger classes. No real basis was suggested for this discriminatory treatment by the Commission other than to mention a few scattered workers elsewhere who do not have them and to say that the present wage structure of through freight and passenger employees makes holidays unnecessary. In this latter connection, the Commission states:

The Carriers' most persuasive arguments arise out of the wage structure for operating employees, but are valid only with respect to road operating employees who enjoy the benefits of the mileage factor in the dual basis of pay. A substantial proportion of these employees have substantial amounts of time off while still earning at least the equivalent of 30 days' basic pay per month. Yard and assigned local freight employees, on the other hand, typically work full work weeks and months, and are compensated, in effect, on an hourly or daily basis.

If this statement had any validity for these employees in the past, the wage structure and other recommendations made by this Commission now invalidate it completely. Acceptance of this recommendation would impose a serious inequity on extra yard service employees,

as well as on all road freight and passenger employees who have been refused paid holidays.

The Commission denies night-shift pay to all classes. Although recognizing the general prevalence of night-shift pay in other industries, the Commission again dredged up a few exceptions in the transportation industry to support its recommendation. Acceptance of this recommendation will leave a serious injustice in the wage structure.

The staff studies showed that other transportation workers—particularly in the most nearly comparable airlines—get full reimbursement for their away-from-home expenses. Unable to ignore the injustice of denying such a provision to the road operating employees, the Commission compromised on a half loaf and granted reimbursement of lodging outlays under limited circumstances, but denied such reimbursement under other circumstances, as well as denying meal expenses. Moreover, the Commission recommended no away-from-home expenses, other than a limited lodging outlay for employees in regularly assigned road service who are required to lie over at away-from-home terminals for unlimited hours without any compensation whatsoever. The acceptance of these recommendations would leave a serious inequity most difficult to overcome in the future.

It is clear that the recommendations of the Commission in this area are a makeshift—made necessary either because of the lack of time to properly utilize the studies and statistical summaries which had been prepared as guides to Commission action, or by a desire to ignore such studies when they contradicted a conclusion the Commission wished to make.

Conclusion

The recommendations of the Commission for revision of the wage structure were admittedly conceived in haste. The failure of the Commission to achieve a thoughtful and considered revision of a complicated wage structure will be a grave disappointment to the employees. The recommendations would create chaos in a structure that at least is working, however much it may need modernization. Haste and the accompanying failure to exercise a balanced judgment has led to a suggested wage structure which is incomplete, haphazard, inequitable and woefully short of a sound and well conceived plan for revision.

Interdivisional Runs

This subject is discussed in chapter 11 of part V of the report dealing with employee assignments.

The recommendations of the Commission on this subject would give the carriers the right to establish any number of interdivisional employee assignments without appropriate consideration to the detrimental effect upon all employees concerned.

Much has been said elsewhere in the Commission's report to the effect that comprehensive modernization of the working rules applicable to operating employees has not taken place in over a half-century. This cannot be said about the existing national rules applicable to the establishment of interdivisional service. The present national rules applicable to the right of a carrier to establish interdivisional service were adopted in 1951 and 1952. These rules provide a procedure for resolving any request by a carrier to establish interdivisional service in a particular territory or territories. Such rules stipulate that in dealing with a request of this type the carrier and its employees should definitely recognize each other's fundamental rights, and that *reasonable and fair arrangements should be made in the interests of both parties.*

It is therefore difficult to understand the reasoning of the Commission when: (1) it recognizes the 1951 National Agreement as a "Model Agreement" and then widely departs from it in the recommendation whereby the carriers are given the right to establish interdivisional service in *any* territory and operate such service in *any* manner, i.e., in assigned, unassigned, or extra service; (2) the carriers are given the right to establish, move, consolidate or abolish crew terminals, including the right to run through established crew terminals; and (3) the carriers are given the right to use crews operating in interdivisional service to handle any class of traffic regardless of its origin or destination, thereby having the right to use crews operating in interdivisional service to infringe upon crews operating in intradivisional service exclusively.

Experience has shown that, where interdivisional service assignments have been established, the results in many instances have been a reduction in employment in road and yard service and among the nonoperating classes.

A broad arrangement such as the Commission recommends would undoubtedly result in the elimination of many employee jobs in both road and yard service without any severance compensation or other protective provisions for employees eliminated from the service. Neither are those employees remaining in the service afforded adequate protection. The elimination of employee jobs in the adoption of such an arrangement could be increased to great proportions if many of the carriers are successful in their present program, even in a small way, to effect consolidations and mergers of various railroads into a single road.

The Commission's recommendations are without appropriate regard for the effect on the employee working force. Adequate protection benefits are essential, not only to those who are eliminated from the service, but also to those retained in the service who would be required to work under harsh and drastically changed conditions. The protection provisions in Item 2(c) of the recommendations fall far short of equity so far as these employees are concerned.

Moreover, a potential of the Commission's recommendations is the specter of deserted communities by elimination of facilities and job assignments in all railroad crafts and the necessity of families moving to other locations if employment is to be secured.

Conclusion

A careful review of the evidence submitted to the Commission demonstrates that the establishment of interdivisional service is not a matter of concern on many railroads and that it does not warrant a change in the existing national rules. Considerable interdivisional service has been established throughout the Nation by agreement between the parties. The carriers have been required to fully pursue the provisions of the national rules in but two or three instances in the last decade. Such a record does not support the recommendations of the Commission.

Combination of Road and Yard Service

This subject is discussed in chapter 12 of part V of the report dealing with employee assignments.

In discussing the recommendations on this issue we shall try to exercise a restraint which we do not feel. These recommendations are among the most severe, in terms of impact on employees, of any made by the Commission. Our emotions are all the more embroiled because the actual significance of the recommendations is veiled by a discussion which makes it appear that the Commission is only concerned in providing the carriers with relief in certain extreme or borderline situations which it regards as unreasonable and oppressive. What is not revealed is that these recommendations are far more sweeping than indicated by the discussion and, if placed in effect, will result in damage to employee morale and job loss of incalculable proportions. Neither is it revealed that the Commission could easily have obtained the limited objectives to which it purported to subscribe by measures far less harsh and oppressive to employees. In short, the Commission says one thing and does another.

The damage to morale will be deep and permanent. Employees will be forced to work side by side in the performance of identical

work at different rates of pay. From time immemorial there has been a difference in the compensation and the pay structure as between employees engaged in road service and employees engaged in yard service. The Commission recommends a continuance of the historical difference in compensation and pay structure for these two different groups of employees.

Under its recommendations on pay structure, for example, the hourly rate of a brakeman in road through freight service would be \$2.48, while a brakeman in yard service would be paid \$2.90 an hour. If the recommendations in part IV of the report are combined with those under discussion, the effect will be to compel the road brakeman to perform yard work at a cheaper rate than yardmen would be paid for the same work. Other members of the road crew will be similarly affected. Words alone will not adequately describe the impact on morale.

The Commission has, as we have said, veiled the real impact of its recommendations by making it appear in its general discussion that only incidental, limited, and minimal amounts of work and time are involved. The fact is that the apparently innocuous phrase in the recommendations that roadmen should perform yard work "in connection with their own trains" actually involves yard operations which may consume *hours* of time and effort by roadmen. Contrary to the impression left by the discussion of the Commission, such work does not necessarily involve only minimal time and effort by roadmen.

The extent to which yard work may be shifted to roadmen is left entirely to the unilateral discretion of management under the recommendations of the Commission. A road freight train is frequently made up by the yard crew hours before the road crew reports for duty. Dependent on management discretion, this yard work may be completely performed by the yard crew, or much of it may be left undone to await the arrival of a road crew. To cite only one example, a yard crew may assemble a freight train of 100 or more cars and then discover the presence of several "bad order" or "no-bill" cars in the train. The yardmaster has a choice of directing the yard crew to remove the cars and shunt them to another track or of leaving them in the train until the road crew reports sometime later. This yard work is not, as the Commission implies, merely "incidental" to a road trip. In a congested yard the removal of these cars may involve several hours of time and effort by the road crew before departure on the road trip.

At the completion of the trip the road crew may be instructed to perform additional yard work at its final terminal. Any benefit in release time that the road crew may have derived from its efforts in moving the train over the road as quickly as possible may be absorbed

at the discretion of management. It may even be cheaper in some instances to discontinue a yard crew and pay some overtime, if necessary, to one or more road crews. In any event, whatever incentive may be left in the mileage component of the roadmen's pay under the Commission's recommendations for revision of the wage structure is nullified by the recommendations on this issue.

These illustrations might be multiplied many times over. Railroad yard operations are fluid enough to permit the shift of a considerable volume of yard work to road employees working at lower rates of pay. To the extent that this is done, yard employees will be eliminated and the performance of yard work will be transferred to road employees working at lower rates of pay. The obvious tendency will be to shift as much yard work as possible to the roadmen with a consequent job loss by yardmen. The tendency to transfer yard work to roadmen will be particularly true in yards where more than one yard shift is employed, with the resultant elimination of the second or third shift.

The Commission says that only limited amounts of yard work should be shifted to roadmen but, contrary to its general discussion, it has actually removed all limitations on the carriers. By relieving the carriers of all obligations to make any payment to roadmen for the performance of yard work, either in the form of additional compensation or in the form of a penalty payment for violation of a limiting rule, the carriers are left free to impose yard work of any amount or description on roadmen without any restraint of cost. In fact, the more yard work that can be transferred to road employees, the cheaper it will be.

Although the Commission purports to deny the request of the carriers that all lines of demarcation between road and yard service be erased, it is difficult, if not impossible, to discover any genuine restriction. The limitations on use of roadmen where yardmen are on duty are meaningless if not enforceable. While the Commission uses many words to promote the idea that the proposal maintains a practical line of demarcation, it carefully proposes to eliminate all means of enforcement. The phrase "in connection with their own trains" is also a meaningless use of words since, in a broad sense, all yard work is in connection with some road train. In any event words alone mean nothing unless supported by some means of enforcement. There is, therefore, a degree of cynicism inherent in proposing a maze of language which is stripped of all effective means of enforcement by removal of compensation or penalty for violations.

Thus, while the Commission pays lip service to preservation of some line of demarcation between road and yard service, the Commission in fact proposes to erase it. No restraint in the form of compensation or penalty for violation of any limiting rule hereafter negotiated is pro-

vided or to be permitted. The removal of all effective restraints of cost, accompanied by the constant temptation to seek a lower rate, and encouraged by a loose generality of language, grant the carriers an unlimited license to impose yard work on roadmen without restraint.

Yards were not created by collective bargaining. Independent of collective bargaining, yards exist as separate operational facilities of the railroads. They are created to perform a function separate and distinct from the over-the-road operations of the carrier. Each yard is a system of tracks and specialized equipment for the classification and reclassification of cars so as to separate and reassemble cars into numerous trains operating in over-the-road movements, possibly in different directions to many different industries and destinations. The working conditions of yardmen are markedly different from those of roadmen. Major differences in rules governing compensation, working conditions, and seniority have evolved. The Commission was faced with the necessity of striking an appropriate balance between these considerations and the efficiency of operations. The answer was not to grant an uninhibited license to the carriers and open the issue to abuse as is done in the recommendations of the Commission.

If the Commission is sincere in its statement that it intends to preserve a line of demarcation between road and yard work, then it should have recommended some effective means of maintaining it. Either the line is to be maintained or it is to be erased. The issue should be handled in a forthright manner. If the line of demarcation is to be maintained, then borderline situations will develop wherever the line may be fixed. It is these borderline cases, with supposedly minimal amounts of time and effort, that seemed to concern the Commission. Even this problem could have been met without granting the carriers an unlimited license which in effect erases the line entirely while pretending to maintain it.

If the Commission was determined to eliminate time claims by roadmen for a minimal amount of work in a yard, it could have achieved this objective by granting the carriers a few minutes free time but accompanied it by a provision for premium compensation to roadmen when directed to perform a more excessive amount of yard work. The time claims for minimal work would be eliminated and at the same time carriers would not be granted unlimited discretion to transfer yard work to roadmen.

This would have relieved the carrier of the so-called oppression and inflexibility in borderline, or "gray" areas, and at the same time protected these employees from the unlimited abuse opened up by the sweeping recommendations of the Commission which contain no restraint and in fact invite the carriers to exercise an unlimited license in requiring roadmen to perform yard work.

Conclusion

It is an understatement to say that the impact of the recommendations on morale and on loss of jobs will be severe. The Commission evidently failed in understanding this issue and opened it to abuse.

Concluding Statement of Commissioners S. W. Holliday and H. F. Sites

It should be noted that we do not disapprove every recommendation of the Commission. For example, we have said that the recommendation for an increase in the compensation of yardmen is merited. Also, while the recognition of the need for protection to employees affected by technological change is to be commended, it is insufficient in amount and may be open to avoidance under some circumstances. Again, the provision for correction of the long standing inequity to conductors and brakemen arising from graduated rates is a step, though incomplete, toward correction of this disparity.

While the Commission recognized a few instances in which relief is patently due the employees, the benefits are rare and even in these instances are sometimes dissipated by other recommendations. Thus, in the case of yardmen, the recommendations on the issues of Inter-divisional Runs and Combination of Road and Yard Service are designed to eliminate many yard jobs by transfer of yardmen's work to roadmen.

The Commission does not explain why certain employees, who would lose their jobs under their recommendations, are left to shift for themselves bereft of protection after years of service, although in some instances the Commission accorded protection to other employees who may suffer a similar loss of employment. This difference in treatment is inexplicable.

Time has not permitted an expression in all respects of our concepts of the views of the majority. Further, while we have confined our dissent to issues of immediate concern to train and yard employees, we also wish to register our disagreement with the recommendations of the Commission on the use of firemen-helpers. We make these statements in order that any omission to record our disagreement will not be understood as acquiescence in the views of the majority of the Commission.

As a whole the recommendations favorable to employees are limited. For the most part they serve to create new and severe problems. In its haste the Commission failed to achieve well-considered and balanced solutions in many areas. In addition, the Commission admittedly ventured into an area beyond the scope of its jurisdiction as, for example, the open attempt to furnish the carriers with lobbying material for repeal of "full crew" laws by offering advice to state legis-

latures, without actual inquiry into the circumstances. This tendency to volunteer advice even extended into the matter of employee representation and organizational policies.

It is unfortunate that the overall recommendations of the Commission will create so much by way of discord. The fact is that the Commission failed to use these proceedings as an opportunity for thoughtful judgments which would have benefited both the carriers and the employees for years in the future.

STATEMENT OF COMMISSIONER JAMES W. FALLON

We cannot concur with the report in its present form. Although there are certain principles in the report which have merit, some are too generalized or limited, some seem to be reversed or disregarded in the recommendations, and some are so unfavorable to the employees that they must be rejected.

In commenting on specific portions of the Report of the Presidential Railroad Commission, certain prefatory remarks are in order: First, it is of course impossible to comment in detail on all points in the report in view of the obvious limitations in time. Second, the mere silence with respect to certain recommendations in the report is not to be interpreted as assent. It is possible that, with respect to such recommendations, there may be agreement with the general principle or principles enunciated, but many questions with respect to their implementation would have to be clarified before any agreement on principle can be reached. Third, in areas in which general assent is given, assent means agreement to the general principle rather than the specific application of the principle to actual situations. The application of such recommendations to actual situations certainly would require further clarification.

Wage Structure

We note that the Commission has recommended an upward adjustment of the basic wage rates of yardmen. This recommendation moves toward correction of an inequity which has been with us for many years and which has come to the fore recently. In this connection, we take cognizance of the fact that the Commission emphasizes in its report that it is concerned with the *structure* of wages and not the *level* of wages since a general wage increase issue was not involved in this proceeding. We are also aware of the fact that the Commission states that its recommendations would not preclude further wage adjustments with respect to the inequity. We note, as well, that the Commission concludes not only that yard work has been undervalued (in terms of rates) but also that, as a result of varying methods of wage payment between roadmen and yardmen, the earnings differentials between roadmen and yardmen have widened over the years. The net effect of these observations on the part of the Commission is the recognition of the undervaluation of the job con-

tent of yardmen (essentially a basic rate issue) and the inequities that they have suffered over the years because of differences in methods of computing wage payments (essentially an earnings issue).

The Commission correctly recognizes the wage discrimination which the yardmen have suffered over the years. The amount of the adjustment is inadequate. But on the basis of the comments of the Commission, which indicated that it was operating under certain constraints, it is assumed that further adjustments of the inequity will be made in the future. We understand that the recommendations of the Commission do not represent a final decision with respect to the appropriate wage differential between roadmen and yardmen.

These comments are in no way intended to imply that the adjustments proposed for roadmen are correct and should be sustained. Rather, we make these comments solely to note that the Commission has seen fit to recognize an obvious undervaluation of the services of yardmen.

The Commission has also seen fit to correct two other inequities of yardmen which have existed for several years. First, it accepts the principle that the yardmen are entitled to holidays with pay and that the assessment of the cost of these holidays on the workers, by reducing wage rates, is wrong. Second, the Commission has agreed that yardmen are entitled to certain work guarantees, a working condition which exists in other crafts. This is a principle which yardmen have sought for many years. Proper implementation of this portion of the report would correct privations which are especially prevalent among these railroad employees. Work guarantees are essential to any effort to modernize working conditions.

Manning and Interdivisional Runs

In this part of the statement we are concerned with, first, the role of the fireman in the engine service; second, the manning of self-propelled machines; third, the establishment of interdivisional runs; and fourth, the size of the ground crew.

As far as the use of the fireman is concerned, the ground crew, based on personal experience, knows that the fireman is essential to the safety of each member of the crew. It is important to note that in the report the recommendation, as made, would remove from the area of collective bargaining an issue which is vital to the safety of the ground crew. These men are the very ones who would bear the full brunt of the hazards which can develop if a fireman is not present in the cab of a yard engine. We take vigorous exception to this recommendation.

The report recommends that all rules, governing the manning of self-propelled machines, be eliminated. Here, too, the recommenda-

tion is based on limited evidence and fails to recognize the importance of the rule to the safety of all operating workers.

In connection with the establishment of interdivisional runs, the Commission agrees that the issue should be handled at a local level and that certain management excesses might develop.

With respect to the consist of the ground crew in yard service, the report, in its own words, contains conclusions based on inadequate evidence. The report actually states that the only evidence available was opinion. It then proceeds to draw the conclusion that there is some overmanning, although the extent of it is unknown. The report recommends that the question of the crew consist be handled by collective bargaining as a first step. Failing the resolution of the issue, it recommends that the question be submitted to arbitration.

The report, in dealing with the various questions of manning and the establishment of interdivisional runs, strongly supports the process of free collective bargaining and recognizes the necessity for conducting collective bargaining at the local level where the parties have full knowledge of the situation. It then recommends arbitration procedure which destroys the collective bargaining process.

The collective bargaining process in this country has always been based on the principle that the terms of contracts would be negotiated freely between the parties. Failure to resolve any conflict arising out of the process could go either one of two routes—one route is the use of the strike threat on the part of both parties as the pressure which brings the parties together; the other route is, at times, by voluntary arbitration, that is, both parties agreeing to arbitrate an issue. The latter route has generally not been employed by the trade union movement in disposing of differences between the parties with respect to contract clauses. The labor organizations have generally agreed to arbitration of grievance disputes. Even in these instances we know that if either party is dissatisfied with the award, it has an opportunity to raise the issue in a subsequent collective bargaining session when the contract is subject to revision. In this way, the free collective bargaining process, so essential in our free society, is protected.

The recommendation in the report to arbitrate the questions of crew consist and interdivisional runs, if put into effect, aside from its impact on the collective bargaining process, would give management an opportunity to harass the labor organizations and make it difficult for them to carry forward their legitimate objectives. This type of arbitration makes a mockery out of collective bargaining, since it provides management with a built-in incentive to avoid good faith collective bargaining.

Combination of Road and Yard Service

The Commission notes the historical basis for the separation of road and yard service. It recognizes the impracticability of combining these two distinct services in view of the work performed. It also recognizes the differences in the bidding and assignment and pay of roadmen and yardmen. The Commission further notes the fact that there is considerable variation not only among carriers but even on a given carrier with respect to the general working conditions. In these conclusions, the Commission accepts the arguments set forth by the labor organizations in their presentation before the Commission.

The Commission apparently is concerned with certain gray areas where the two crafts may overlap. In an attempt however, to set forth recommendations for the so-called gray areas, which apply not only to road and yard combination but also to certain yard assignments, the report contains some serious errors. Here, too, the report is based on unsupported opinion, or limited experience, or both. The conclusions are drawn from illustrations presented by the carriers, designed to show the so-called "bad" situations, or from the experiences of neutral referees who had observed the "unusual" situations. The report fails to give weight to the fact that, in the day-to-day operations of the railroads, many of these problems and issues are disposed of by mutual agreement between the parties. The report fails to recognize that we are dealing with very complex situations and that these situations can be handled only at a local level through the free collective bargaining process.

The effect of the recommendations contained in the report, with respect to the road and yard combination issue and yard assignments, would be to set back collective bargaining by more than 50 years. It would give management the right to determine *unilaterally* when a particular craft could perform certain duties. It would take away basic craft rights after acknowledging the basic distinction between the two crafts. Permitting inroads on basic rights provides the avenue for the continuous erosion of these rights.

What is most unfortunate is that the recommendations, founded on admittedly limited evidence and if made effective, would lead to the eventual elimination of the distinction between road and yard service, a distinction which is recognized by the Commission.

These recommendations, if adopted, would place in the hands of management the right to destroy, in one stroke, a man's livelihood and family life, for which the Commission has shown great concern in other parts of the report. No labor organization can relinquish the right to bargain over issues which are of such importance to its members.

The Commission notes that the labor organizations are concerned with the possible excesses of management. Despite this acknowledgment, the destinies of workers are thrown into the laps of management. The report reflects little appreciation of the struggles of railroad workers over the years to obtain basic rights. It reveals little recognition of the fact that for many years the managers of the railroads have attempted to destroy the rights of the workers, and that they would now do so were it not for the existence of strong railroad labor organizations. We cannot accept those recommendations in the report which would take us back to the labor jungles of the nineteenth century.

The Commission notes that the following information was furnished by the possible owners of the property. It is to be noted that the Commission has not been able to determine the exact location of the property, but it is believed that the property is situated in the vicinity of the intersection of the main highway and the branch road. It is further noted that the property is situated in the vicinity of the intersection of the main highway and the branch road. It is further noted that the property is situated in the vicinity of the intersection of the main highway and the branch road.

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LETTER OF COMMISSIONER A. F. ZIMMERMAN
PRESIDENTIAL RAILROAD COMMISSION

200 MARYLAND AVENUE NE.
WASHINGTON 25, D.C.

FEBRUARY 21, 1962.

The Honorable SIMON H. RIFKIND,
Chairman, Presidential Railroad Commission,
500 VFW Building,
200 Maryland Avenue, NE.,
Washington, D.C.

DEAR SIR: On February 13, 1962 I received your memorandum stating that the Commissioners could submit comments on the public members' draft report up to 5:00 PM today. On February 20, I received a memorandum from Mr. Arnow amending yours of February 13. A new deadline for the final submission of "views" for inclusion in "the completed report" is set for close of business February 23.

You will not be surprised to learn that the public members' proposed draft—including important material received as late as yesterday—is so obnoxious as to be unacceptable to me.

My responsibilities with the Commission were accepted by appointment from the President of the United States. My views will be reported directly to the President, including my observations covering the performance of a Commission that was appointed for the purpose of and was expected to assist in resolving labor-management differences and maintaining peace on the American railroads but has regrettably succeeded only in making peaceful settlement difficult if not impossible of attainment.

Very truly yours,

/s/ A. F. Zimmerman,
A. F. ZIMMERMAN,
Member.

STATEMENT OF THE CARRIER COMMISSIONERS

In expressing disappointment with some of the provisions of the Commission's report, we recognize that no subject as complex as the outdated work rules in the railroad industry can be settled to the complete satisfaction of everybody. Nevertheless, some of the recommendations the Commission has made to the employees, particularly in costly holiday pay and in other financial areas will place an added burden on the already hard-pressed railroads.

It is true that the recommendations of the Commission will eliminate or correct many of the inequitable and obsolete rules and practices now governing the compensation and assignment of railroad employees, and will eventually permit the carriers to abolish many of the redundant positions which now involve such a costly waste of manpower in the railroad industry.

However, in its approach to these problems the Commission has gone to extreme lengths to protect the employees from any adverse effects that might result from its recommendations and in so doing has ignored the financial condition and future prospects of the railroad industry.

The Commission states in its report that:

Some of the material presented to the Commission has dealt with the industry's financial ability and its capacity to meet the competition it faces. The conclusions of this Commission are not based on judgments concerning the ability or inability of the industry to pay. The directions to be taken in solving the problems before us do not, in our opinion, depend upon an evaluation of the industry's finances. Views concerning finances might conceivably affect the pace of necessary adjustments but they do not bear significantly upon the directions which adjustments should take.

We cannot help but be disappointed with those recommendations of the Commission which disregard the financial needs of the industry. Among the Commission's recommendations which will prove costly to the railroads are furlough allowances, separation allowances, supplemental unemployment insurance, and other expenses which the roads are not now called upon to bear. There is no precedent in American industry for protective provisions of such cost or magnitude. These recommendations will make the railroad industry a leader in this field without regard to its ability to assume the financial burdens involved in such leadership.

Other recommendations in this area which are a disappointment to the railroad industry are those concerning revisions in the wage structure. Management testimony showed that certain railroad operating employees are already overpaid for the services that they perform. The Commission has recommended that the differences in the levels of earnings of such employees found to be inequitable be eliminated by the establishment of a new system of basic rates at levels higher than those presently in effect.

The Commission's recommendations ignore the problem created by many rules requiring pay for time not worked, duplicate time payments, and compensation that is not commensurate with the value of the service rendered. Thus, the Commission has declined to recommend the abolishment of archaic earnings guarantees that no longer serve any legitimate purpose but merely provide unearned compensation for the employees who are the beneficiaries of these discriminatory rules.

We are disappointed that the Commission has not granted the carriers' request for the abolishment of many arbitrary payments and special allowances which provide duplicate payments for the same service. The Commission has ignored the carriers' request for the elimination of higher than standard rates and mountain and desert differentials which were established many decades ago when both operating and living conditions in the affected classes of service and in the geographical areas involved were far different from what they are today.

In the absence of voluntary agreement between the parties, the Commission, at the insistence of the participating unions, was created to make its recommendations in what it considers to be the interest of the general public. Notwithstanding what we consider the deficiencies of this report, as it pertains to the denial of the revisions suggested by management and the increased cost involved without regard to the ability of this industry to pay those costs, we are convinced that basically these recommendations are designed to serve the public interest.

Consequently, the public interest being paramount, we are accepting the full report and will affix our signatures thereto.

Other important factors in this case which are a direct result of the early labor movement are the fact that the industry is a highly organized one. Management has been able to control the industry by the use of the early labor movement. The industry is a highly organized one. Management has been able to control the industry by the use of the early labor movement. The industry is a highly organized one. Management has been able to control the industry by the use of the early labor movement.

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Appendixes

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APPENDIX A

Executive Order No. 10891
(November 1, 1960) and
Memorandum of Agreement
Dated October 17, 1960

APPENDIX A

Executive Order No. 10831
(November 1, 1960) and
Memorandum of Agreement
Dated October 17, 1960

EXECUTIVE ORDER 10891

**ESTABLISHING A COMMISSION TO INQUIRE INTO A CONTROVERSY
BETWEEN CERTAIN CARRIERS AND CERTAIN OF THEIR EMPLOYEES**

By virtue of the authority vested in me by Title I of the General Government Matters Appropriation Act, 1961 (74 Stat. 473, 475), and as President of the United States, it is ordered as follows:

Section 1. There is hereby established a Presidential commission to consider a controversy between and involving certain proposals of, the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committee and certain of their employees represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America. The commission shall consist of fifteen members to be designated by the President as follows: five members from among persons nominated by the carriers, five members from among persons nominated by the employees, and the chairman of the commission and four other members without nominations.

Sec. 2. The commission is authorized and directed to investigate and to inquire into the issues raised by the proposals of the parties involved in the above-mentioned controversy with the objective of making a report to the President, including its findings and recommendations with respect to the controversy, and assisting in achieving an amicable settlement and agreement with respect to issues in dispute between the parties. In connection with its inquiry, the commission is authorized to hold such public hearings and to hear such witnesses as it may deem appropriate. It shall provide a full and fair hearing to the said parties and shall otherwise endeavor to conform its proceedings and activities to the understanding upon the basis of which the controversy is submitted to the commission by the parties thereto.

Sec. 3. All executive departments and agencies of the Federal Government are authorized and directed to cooperate with the commission in its work and to furnish the commission with such information and assistance, not inconsistent with law, as it may require in the performance of its duties.

Sec. 4. The controversy referred to in sections 1 and 2 of this order is hereby found to constitute an emergency affecting the national interest within the meaning of the provisions appearing under the heading "Emergency Fund for the President-National Defense" in Title I of the General Government Matters Appropriation Act, 1961 (Public Law 86-642), approved July 12, 1960. During the fiscal year 1961 the expenditures of the commission may be paid out of an allotment made by the President from the appropriation made under the aforesaid heading "Emergency Fund for the President-National Defense"; and during the fiscal year 1962, to the extent permitted by law, such expenditures may be similarly paid from any corresponding or like appropriation made available for the fiscal year 1962. Such payments may be made without regard to the provisions of (a) section 3681 of the Revised Statutes (81 U.S.C. 672), (b) section

9 of the act of March 4, 1909, 35 Stat. 1027 (31 U.S.C. 673), and (c) such other provisions of law as the President may hereafter specify. The members of the commission shall receive such expense allowances as the President shall hereafter fix. The chairman of the commission and those other members of the commission who are designated by the President under section 1 hereof without nominations shall receive such compensation as the President shall hereafter specify.

Sec. 5. The commission shall endeavor to make a final written report of its findings and recommendations not later than December 1, 1961. The commission shall cease to exist thirty days after the rendition of its final report to the President.

Sec. 6. The provisions of this order shall become effective on January 1, 1961, except that on any earlier date or dates (a) nominations may be presented to the President under the provisions of section 1 of this order, (b) persons may be designated as members of the commission under the provisions of section 1 hereof, such designations to become effective on January 1, 1961, and (c) funds may be allotted under the provisions of section 4 hereof, such funds to become available for expenditure on January 1, 1961.

DWIGHT D. EISENHOWER

The WHITE HOUSE

November 1, 1960.

MEMORANDUM OF AGREEMENT

THIS AGREEMENT made and entered into this 17th day of October, 1960, between the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, listed in Exhibits A, B and C, attached hereto [see Appendix C or Carriers' Exhibit No. 1] and made a part hereof (hereinafter referred to as party of the first part), and the employees shown and described in said exhibits [see Carriers' Exhibit No. 1] as being represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America, through their Conference Committees (hereinafter referred to as party of the second part).

WITNESSETH:

The parties hereto mutually agree and stipulate as follows:

1. The carriers above referred to are carriers as defined in the Railway Labor Act; the employees above referred to are employees, as defined in such Act, of such carriers; and the above representatives are the duly accredited representatives of such carriers and employees, respectively.

2. The controversy between the parties hereto involves the proposals of the carriers dated November 2, 1959, copies of which are affixed hereto and marked Attachments D, E, and F, [see Appendix B] and the proposal of the employees dated September 7, 1960, a copy of which is affixed hereto and marked Attachment G, including any implementing proposal or proposals that may be submitted to the Commission herein agreed to [see Appendix B], by either of the parties that come within the ambit of such proposals dated November 2, 1959, and September 7, 1960 and the scope of collective bargaining required under the provisions of the Railway Labor Act. This controversy, with the consent and approval of the President of the United States, is hereby submitted to a Commission which shall proceed in general conformity with the recommendations of Emergency Board No. 100, investigate the facts, and report its findings and recommendations to the President. The report of Emergency Board No. 100 shall have no binding effect upon the Commission in making its findings and recommendations. The Commission may recommend that any proposal or implementing proposal or any part of any such proposal should be rejected in whole or in part or accepted in whole or in part, or should be accepted as amended or revised by the Commission, as it finds under the evidence to be justified.

3. The Commission shall consist of fifteen members designated by the President. Five members of the Commission shall be designated from among persons nominated by the party of the first part, five from among persons nominated by the party of the second part, and five, including the chairman of the Commission, shall be designated without nominations from the parties to this agreement. Members nominated by the parties may be required to serve without public compensation. Any vacancy on the Commission, resulting from resignation, inability to serve or otherwise, shall be filled in the manner in which the original incumbent was selected.

4. The Commission shall organize and, subject to the provisions of this Agreement, make all necessary rules for conducting its investigation. It shall give the parties a full and fair hearing. The parties, on their part, agree to give the Commission their full cooperation. The Commission shall also be authorized to use its best efforts, by mediation, to bring about an amicable settlement and agreement between the parties with respect to any issue concerning which the evidence has been heard.

5. It is the intent of the parties that the proceedings of the Commission, including its mediatory efforts and its report shall be considered and accepted as in lieu of the mediation and emergency board procedures provided by Sections 5 and 10 of the Railway Labor Act.

National conferences between the parties under the Railway Labor Act shall be resumed and expedited, provided no settlement is sooner reached, immediately following the report of the Commission.

In the event the National Mediation Board shall proffer its services, or the Board's services be invoked, the parties will jointly request the Board to expedite mediation and as promptly as feasible terminate the Board's services under the Act.

6. The Commission shall commence its proceedings between January the first and January the fifteenth, 1961 at a time and place to be designated by the chairman. The Commission shall make and file its report with the President of the United States, including its findings and recommendations with respect to the controversy described in Paragraph 2 hereof, on or before December first, 1961, except that at the request of the majority of the Commission the parties signatory hereto agree that a reasonable extension of time will be granted not to exceed ninety days.

7. The Commission should be provided with an appropriate staff and should receive from all executive departments and agencies of the Federal Government, and particularly from the United States Department of Labor, such cooperation, information, and assistance, not inconsistent with law, as it may require in the performance of its duties.

8. The Commission shall furnish certified copies of its report, including its findings and recommendations, to the parties, and shall transmit the originals, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the Commissioners, to the President. The Commission shall also furnish a certified copy of its report, and the papers and proceedings, including testimony relating thereto, to the National Mediation Board, to be filed in its office.

9. Each member of the Commission nominated by the parties shall be compensated by the party nominating him.

10. The terms and provisions of this Agreement may be revised and amended by stipulation of the parties subject to the approval of a majority of the Commissioners.

11. Nothing contained in this Agreement and none of the proceedings had pursuant to this Agreement shall be construed as a waiver of any legal right or rights of the parties hereto.

Signed on behalf of the party of the first part by the Chairmen of the Eastern, Western and Southeastern Carriers' Conference Committees and on behalf of the party of the second part by the Chief Executive Officers of the participating Railway Labor Organizations, this day and year as above written.

For the participating carriers listed in Exhibits A, B and C:

By /s/ GUY W. KNIGHT,

Chairman, Eastern Carriers' Conference Committee.

By /s/ T. SHORT,

Chairman, Western Carriers' Conference Committee.

By /s/ B. B. BRYANT,

Chairman, Southeastern Carriers' Conference Committee.

For the employees:

By /s/ R. E. DAVIDSON,

Grand Chief Engineer, Brotherhood of Locomotive Engineers.

By /s/ H. E. GILBERT,

President, Brotherhood of Locomotive Firemen and Enginemen.

By /s/ J. A. PADDOCK,

President, Order of Railway Conductors and Brakemen.

By /s/ W. P. KENNEDY,

President, Brotherhood of Railroad Trainmen.

By /s/ NEIL P. SPEARS,

President, Switchmen's Union of North America.

APPROVED:

By /s/ JAMES P. MITCHELL,

Secretary of Labor.

1. The first step is to identify the problem or question that needs to be answered.

APPENDIX B

Proposals of the Parties

APPENDIX B
Proposals of the Parties

PROPOSALS OF THE CARRIERS

USE OF FIREMEN (HELPERS) ON OTHER THAN STEAM POWER¹

A. Eliminate all agreements, rules, regulations, interpretations and practices, however established, applicable to any class or grade of train, engine or yard service employees, which require the employment or use of firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous and unclassified services) or in any class of yard service (including all transfer, belt line and miscellaneous services to which mileage rates do not apply).

B. Establish a rule to provide that:

1. Management shall have the unrestricted right, under all circumstances, to determine when and if a fireman (helper) shall be used on other than steam power in all classes of freight service (including all mixed, miscellaneous and unclassified services) and in all classes of yard service (including all transfer, belt line and miscellaneous services to which mileage rates do not apply).

2. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the provisions of paragraph 1 of this rule shall be eliminated.

BASIS OF PAY AND ASSIGNMENT OF EMPLOYEES²

Basis of Pay

A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations and practices, however established, applicable to any class or grade of train, engine, yard or hostling service employees, which:

(i) provide for rates or bases of pay, daily earnings minima, minimum daily earnings or daily, weekly or monthly earnings guarantees,

(ii) provide for arbitrary payments, or special or constructive allowances, which conflict with the payment of single time in miles or hours from the time called to report for duty until released from duty, or

(iii) impose restrictions on weekly, monthly or annual earnings through the limitation of miles run or paid for, hours worked or paid for or compensation received.

B. Establish a rule to provide that:

1. Train and engine service employees used in road service, including all miscellaneous and unclassified services, shall be paid single time in miles or hours, whichever is greater, from the time called to report for duty until released from duty at the end of the trip or tour of duty, as follows:

(a) All road miles actually run during each trip or tour of duty shall be paid for at the rates provided in paragraph 3 of this rule; or

¹ Attachment D to the Agreement of October 17, 1960.

² Attachment E to the Agreement of October 17, 1960.

(b) All time on duty shall be paid for on a minute basis at the straight time hourly rates provided by paragraph 3 of this rule, except that (i) In freight service overtime shall be paid for at $1\frac{1}{2}$ times such straight time hourly rates. In assigned local freight service overtime shall begin when the time on duty exceeds the miles run divided by $12\frac{1}{2}$, and in all other classes of freight service (including miscellaneous and unclassified services) overtime shall begin when the time on duty exceeds the miles run divided by 20; but in any case overtime shall not accrue until the expiration of 8 hours from time of first reporting for duty; and (ii) On short turnaround passenger runs, no single trip of which exceeds 80 miles, including suburban and branch line service, time shall be paid on the minute basis at straight time hourly rates for all time actually on duty, or held for duty, in excess of 8 hours (computed on each run from the time required to report for duty to the end of that run) within 9 consecutive hours; and also for all time in excess of 9 consecutive hours computed continuously from the time first required to report to the final release at the end of the last run. Time shall be counted as continuous service in all cases where the interval of release from duty at any point does not exceed one hour. For calculating time paid for as provided herein, the Management may designate the initial trip.

2. Train and engine service employees used in yard service, including transfer, belt line, hostling and all miscellaneous services to which mileage rates do not apply, shall be paid single time, from the time called to report for duty until released from duty, at the straight time rates provided in paragraph 3 of this rule; except that under circumstances where existing rules provide for the payment of overtime at $1\frac{1}{2}$ times the hourly rate, such payments shall be continued at $1\frac{1}{2}$ times the hourly rates provided in paragraph 3.

3. Mileage and straight time hourly rates of pay shall be as follows:

Note: The mileage and straight time hourly rates to be provided in this paragraph 3 shall be determined by multiplying standard mileage and pro-rata hourly rates currently paid under existing agreements immediately prior to the effective date of this proposed rule by the conversion factors set forth in the following table. For classes and grades of service where rates of pay are graduated, the rate paid in the weight on drivers or car scale rate bracket specified in Column (2) of the table shall be used in computing the new single rates.

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket	Conversion Factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Passenger Service Other Than Short Turnaround			
Engineers and motormen.....	450,000 to 499,999 lbs.....	.625	1.9
Firemen and helpers.....	Less than 80,000 lbs.....	.625	1.9
Conductors.....	.....	.667	1.967
Assistant conductors and ticket collectors.....	.....	.667	1.967
Baggage men.....	Minimum rate.....	.667	1.967
Brakemen and flagmen.....	.....	.667	1.967
Short Turnaround Passenger Service			
Engineers and motormen.....	170,000 to 199,999 lbs.....	.6416	1.9
Firemen and helpers.....	Less than 80,000 lbs.....	.625	1.9
Conductors.....	.....	.667	1.9
Assistant conductors and ticket collectors.....	.....	.667	1.9
Baggage men.....	Minimum rate.....	.667	1.9
Brakemen and flagmen.....	.....	.667	1.9

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket	Conversion Factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Assigned Local Freight Service			
Engineers and motormen	250,000 to 299,999 lbs.	1.0	1.0
Firemen and helpers	Less than 140,000 lbs.	1.0	1.0
Conductors	Less than 81 cars	1.0	1.0
Brakemen and flagmen	Less than 81 cars	1.0	1.0

Through Freight Service			
Engineers and motormen	750,000 to 799,999 lbs.	.625	1.0
Firemen and helpers	Less than 140,000 lbs.	.625	1.0
Conductors	106 to 125 cars	.625	1.0
Brakemen and flagmen	106 to 125 cars	.625	1.0

Note: Under circumstances where existing rules provide for conversion from through to local freight rates, the following amounts shall be added to the above mileage and hourly rates:

- Engineers, motormen and conductors—0.25¢ to the mileage rates and 7.00¢ to the hourly rates.
- Firemen and helpers—0.25¢ to the mileage rate and 5.00¢ to the hourly rate.
- Brakemen and flagmen—0.26875¢ to the mileage rate and 4.375¢ to the hourly rate.

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket	Conversion Factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Other Freight Service (Including All Miscellaneous and Unclassified Services)			
Engineers and motormen	250,000 to 299,999 lbs.	0.625	1.0
Firemen and helpers	Less than 140,000 lbs.	.625	1.0
Conductors	Less than 81 cars	.625	1.0
Brakemen and flagmen	Less than 81 cars	.625	1.0

Note: The conversion factor shall be applied to the standard through freight rate paid in the bracket specified.

Grade of service	Identification of the current graduated rate, if rates are graduated, to be used in calculating the new single rates—weight on drivers or car scale rate bracket	Conversion Factor	
		Rate per mile	Rate per hour
(1)	(2)	(3)	(4)
Yard, Transfer, Belt Line And All Miscellaneous Services To Which Mileage Rates Do Not Apply			
Engineers and motormen	200,000 to 249,999 lbs.	1.0	1.0
Firemen and helpers	Less than 140,000 lbs.	1.0	1.0
Conductors and foremen	Less than 140,000 lbs.	1.0	1.0
Brakemen and helpers	Less than 140,000 lbs.	1.0	1.0
Switchtenders	Less than 140,000 lbs.	1.0	1.0
Outside hostlers	Less than 140,000 lbs.	1.0	1.0
Inside hostlers	Less than 140,000 lbs.	1.0	1.0
Outside hostler helpers	Less than 140,000 lbs.	1.0	1.0
Car retarder operators	Less than 140,000 lbs.	1.0	1.0

Note: Where the five-day work week is in effect, the factors set forth above shall be applied to currently applicable five-day work week rates. Where the five-day work week is not in effect, such factors shall be applied to currently applicable (or basic) rates covering other than five-day work week service. Where existing rules provide for paid holidays, 4.0¢ per hour shall be deducted from the rates derived by such application of the foregoing factors.

4. Minimum earnings from all sources for each tour of duty, from the time called to report for duty until finally released, including aggregate service for which payment is made on a continuous time basis, shall not be less than pay for 5 hours at straight time rates in passenger engine service (other than short turnaround); 7½ hours at straight time rates in passenger train service (other than short turnaround), and 8 hours at straight time rates in short turnaround passenger engine and train service, and in all classes of freight and yard engine and train service, including miscellaneous and unclassified services.

5. Compensation for time held at away from home terminal, deadheading, attending court and attending investigations shall be paid under exist-

ing rules (if any) at the rates provided in paragraph 3 of this rule or at a fractional part thereof as may in each case be provided by existing rules.

6. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the foregoing provisions of this rule shall be eliminated; and no employee paid pursuant to the provisions of this rule shall receive any other or additional compensation for any service performed during his tour of duty; provided, that existing rules and practices considered by the carrier to be more favorable are preserved.

Road Train and Engine Service Assignments

A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations and practices, however established, applicable to any class or grade of road train or engine service employees, which:

(i) prohibit or impose restrictions on the right of the carrier to establish, move, consolidate or abolish crew terminals, or merge or consolidate seniority districts;

(ii) prohibit or impose restrictions on the establishment or operation of interdivisional, interseniority district, intradivisional or intraseniority district runs;

(iii) prohibit or provide penalties for running crews through established crew terminals; or

(iv) provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

B. Establish a rule to provide that

1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turnaround (including short turnaround) basis and through established crew terminals. The right to operate such runs as may be established under the provisions of this rule will be free of the imposition of any restrictions as to class of traffic which may be handled or as to the origin or destination of any empty or loaded cars moving on such runs; and such service shall be paid for at the rates provided in paragraph 3 of the Basis of Pay Rule.

2. No rule, regulation, interpretation or practice, however established, shall be construed to in any way prohibit, restrict or limit the provisions of paragraph 1 of this rule except as provided in sub-paragraphs (a) and (b) of this paragraph 2.

(a) The carrier shall distribute the mileage ratably as between employees from the seniority districts affected.

(b) Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees, and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman of its intention to establish such run and the carrier and the general chairman shall endeavor to agree within 90 days upon such other conditions not inconsistent or in conflict with the provisions of paragraph

1 of this rule upon which such proposed run shall be established. In the event the carrier and the general chairman cannot so agree on the matter within 30 days, then the dispute will be submitted to arbitration in accordance with the procedure provided for in Sections 7 and 8 of the Railway Labor Act, as amended, with the limited authority to decide what conditions shall be met under this sub-paragraph (b) by the carrier, if and when such run is established.

8. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved.

Combination of Road and Yard Service

A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations and practices, however established, applicable to any class or grade of train, engine, yard or hostling service employees, which

(i) prohibit or impose restrictions upon the use of passenger crews to perform switching or station work in connection with the cars of their own trains, or to handle the light engine or engines of their own trains,

(ii) prohibit or impose restrictions upon the use of road crews in other than passenger service to perform any and all switching and station work, whether or not such switching or station work is in connection with the cars of their own trains, or to handle the light engine or engines of their own trains,

(iii) prohibit or impose restrictions upon the use of yard crews to perform road work, or to perform service outside of switching limits.

(iv) provide for arbitrary payments, special or constructive allowances or penalty payments to any employee, or class or grade of employees, when road or yard crews perform any of the work described above, or

(v) prohibit or impose restrictions on the right of management to designate or change switching limits or to establish or abolish yard or hostling service or yard or hostling service assignments.

B. Establish a rule to provide that:

1. Passenger crews will perform any and all switching and station work in connection with the cars of their own trains as may be required of them at their initial and final terminals and at all intermediate points, including the clearing of any track or tracks and the shoving and coupling of cars on any track for the purpose of handling the cars of their own trains, and the handling of the light engine or engines of their own trains; and in the performance of such work will handle cars of other than their own trains as may be required, including the respotting of displaced cars. Road crews in other than passenger service will perform any and all switching and station work as may be required of them at their initial and final terminals and at all intermediate points, including the handling of the light engine or engines of their own trains, whether or not such switching and station work is in connection with cars of their own trains. When switching or station work is performed by road crews as provided herein, such work shall be paid for as a part of the road day or trip and additional compensation for such work shall not be paid under either road, yard or hostling rules or regulations. The provisions of this paragraph 1 shall apply whether or not yard crews, yard men or hostlers are on duty when and where the work is performed.

2. Yard crews, where employed, may be required to perform both road and yard service; and where switching limits are established yard crews may be required to perform service outside of such switching limits. When service is performed by a yard crew as provided herein, such work shall be paid for as part of the yard day or tour of duty and additional compensation shall not be paid for such work under either road or yard rules or regulations. The provisions of this paragraph 2 shall apply whether or not road crews are available when and where the work is performed.

3. When road crews perform switching or station work or handle the light engine or engines of their trains as provided in paragraph 1 of this rule, neither yard crews, yard men nor hostlers shall be entitled to any penalty pay or other compensation; nor shall road crews be entitled to any penalty pay or other compensation when yard crews perform road work or perform service beyond switching limits as provided in paragraph 2.

4. Management shall have the exclusive right to designate and change switching limits, and to establish and abolish yard and hostling service and yard hostling service assignments.

5. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the foregoing shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved.

CONSIST OF CREWS*

Consist of Road and Yard Crews

A. Eliminate all agreements, rules, regulations and practices, however established, applicable to any class or grade of train, engine or yard service employees, which require the employment or use of

(i) a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen or flagmen) or more than one conductor in any crew used in any class of road service, including all miscellaneous and unclassified services,

(ii) a stipulated number of brakemen or helpers or more than one conductor or foreman in any crew used in any class of yard, transfer or belt line service, including all miscellaneous services to which mileage rates do not apply, or

(iii) a conductor or trainman in connection with the movement of light engines or in pusher or helper service, or an engineer, conductor or trainman in pilot service.

B. Establish a rule to provide that

1. Management shall have the unrestricted right, under any and all circumstances, to determine when and if trainmen (assistant conductors, ticket collectors, baggagemen, brakemen and flagmen) shall be used in each crew employed in all classes of road service, including all miscellaneous and unclassified services, and if used the number and classification of employees who will be so used; and when and if brakemen or helpers shall be used in each crew employed (including yardmen who work independent of a yard crew) in all classes of yard, transfer and belt line service, including all

* Attachment F to the Agreement of October 17, 1960.

miscellaneous services to which mileage rates do not apply, and if used, the number and classification of employees who will be so used.

2. Management shall also have the unrestricted right, under all circumstances, to determine when and if more than one conductor shall be used in any crew employed in any class of road service, including all miscellaneous and unclassified services; and when and if more than one conductor or foreman shall be used in any crew employed in any class of yard, transfer or belt line service, including all miscellaneous services to which mileage rates do not apply; and when and if a conductor, trainman or yardman will be used in connection with the movement of light engines and in helper and pusher service, and when and if an engineer, conductor, trainman or yardman will be used in pilot service.

3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the provisions of this rule shall be eliminated.

Manning Motor Cars and Self-Propelled Machines

A. Eliminate all agreements, rules, regulations, interpretations and practices, however established, which require the use of engine, train or yard service employees in any capacity on (or in connection with the operation or use of) any motor car or self-propelled roadway or shop equipment or machine used in maintenance, repair, construction or inspection work, whether operated on tracks or otherwise.

B. Establish a rule to provide that

1. Engine, train and yard service employees shall have no claim to man or to be called to work in any capacity on or in connection with the use or operation of inspection motor cars used by company officials, or motor cars operated with or without trailer cars and used by telegraph, telephone or company forces in the performance of maintenance, construction or inspection work, or self-propelled roadway or shop equipment or machines used in repair, construction or maintenance work, such as (this enumeration being by way of illustration and not by way of limitation) track motor cars operated with or without trailers, inspection motor cars, locomotive cranes, ditchers, clamshells, pile drivers, scarifiers, wrecking derricks, weed burners, rail detector cars, and all other self-propelled roadway and shop equipment and machines, whether operated on tracks or otherwise, or with or without cars.

2. Management shall have the unrestricted right, under all circumstances, to determine when and if engine, train and yard service employees shall be used on motor cars and self-propelled roadway and shop equipment and machines, as described in paragraph 1 of this rule; and to determine the number and classification of such employees when so used. If an engine, train or yard service employee is so used, he will be paid the rates and under the rules applicable to work train service; and in such case, each day such service is performed the time of the employee used shall be computed from the time he is required to report for duty until he is released from duty at the point where he is so relieved.

3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the provisions of this rule shall be eliminated.

PROPOSALS OF THE ORGANIZATIONS¹

Notice of September 7, 1960

A. Negotiate agreements providing for the following:

1. Improvements in the existing wage structure including but not limited to provision for adequate compensation for night work and shift differentials, daily, weekly and monthly guarantees, payment for time held away from home and improved overtime rules.
 2. Consist of crews including Engineers (Motormen), Firemen (Helpers), Conductors, Brakemen, Hostlers, Hostler Helpers, Yard Conductors (Foremen) and Yard Brakemen (Helpers), the adequacy of the number of men in the crew and their qualifications and training.
 3. Financial and other protection of employees affected by mergers, consolidations, abandonments, technological changes in operations, or by changes in working conditions.
 4. Stabilization of employment.
- B. Establish a commission to function in general conformity with the recommendation of Emergency Board No. 100 to investigate and report respecting the changes requested above and your notices of November 2, 1959, with the view of assisting the parties to arrive at an agreement.

EMPLOYEE IMPLEMENTING PROPOSALS²

I. Work Day and Work Month

A. Through Freight Service—Engine and Train Service Employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the work day and work month with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers or cars hauled, except that mileage rates shall be maintained.

Basic Day—Basic Unit

Six (6) hours or less, one hundred (100) miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that six (6) hours shall constitute a basic day, one hundred (100) miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

Work Month

The work month shall consist of twenty-six (26) calendar days with four (4) days off at home terminal each thirty (30) days, off days to be assigned in assigned service and, where possible, in pool and unassigned service.

¹ Attachment G to the Agreement of October 17, 1960.

² From Employees' Exhibit No. 1.

5. Straightaway Passenger Service—Engine and Train Service Employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the work day and work month with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers, except that mileage rates shall be maintained.

Basic Day—Basic Unit

(a) Engineers and Firemen:

Four (4) hours or less, one hundred (100) miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that four (4) hours shall constitute a basic day, one hundred (100) miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

(b) Conductors and Trainmen:

Six (6) hours or less, one hundred and fifty (150) miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that six (6) hours shall constitute a basic day, one hundred and fifty (150) miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

Work Month

The work month shall consist of twenty-six (26) calendar days with four (4) days off at home terminal each thirty (30) days, off days to be assigned in assigned service and, where possible, in pool and unassigned service.

II. Work Day and Work Week

A. Short Turnaround Passenger Service

1. Train Service Employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the work day and work week with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, except that mileage rates shall be maintained.

Basic Day—Basic Unit

Seven (7) hours or less, one hundred and fifty (150) miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that seven (7) hours shall constitute a basic day, one hundred and fifty (150) miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

Work Week

The work week shall consist of five (5) consecutive work days with two (2) consecutive assigned days off at home terminal each seven (7) days.

Hours of service paid for at the time and one-half rate during any twenty-four (24) hour period or trip in the work week shall not be used in computing the work week.

The work week of any employee shall be considered as starting on the first day of any calendar week in which he renders service.

Note: Short turnaround passenger service for train service employees is service no single trip of which exceeds eighty (80) miles, including suburban and branch line service.

2. Engine Service Employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the work day and work week with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers, except that mileage rates shall be maintained.

Basic Day—Basic Unit

Seven (7) hours or less, one hundred (100) miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that seven (7) hours shall constitute a basic day, one hundred (100) miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

Work Week

The work week shall consist of five (5) consecutive work days with two (2) consecutive assigned days off at home terminal each seven (7) days.

Hours of service paid for at the time and one-half rate during any twenty-four (24) hour period or trip in the work week shall not be used in computing the work week.

The work week of any employee shall be considered as starting on the first day of any calendar week in which he renders service.

Note: Short turnaround passenger service for engine service employees is service no single trip of which exceeds eighty (80) miles, including suburban and branch line service.

B. All Other Classes of Road Service—Engine and Train Service Employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the work day and work week with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers or cars hauled, except that mileage rates shall be maintained.

Basic Day—Basic Unit

Seven (7) hours or less, one hundred (100) miles or less, shall constitute a basic day and basic unit of work. (This is intended to mean that seven (7) hours shall constitute a basic day, one hundred (100) miles shall constitute a basic unit of work; provided that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

Work Week

The work week shall consist of five (5) consecutive work days with two (2) consecutive assigned days off at home terminal each seven (7) days.

Miles or hours of service paid for at the time and one-half rate during any twenty-four (24) hour period or trip in the work week shall not be used in computing the work week.

The work week of any employee shall be considered as starting on the first day of any calendar week in which he renders service.

C. Yard, Belt Line, Transfer and Hostler Service—Engine and Yard Service Employees

Establish or amend rules, regulations or agreements relating to hours of service and rates of pay to provide the following standards for the work day and work week with maintenance of basic take-home pay.

The percentage of increase in basic rates required to maintain basic take-home pay shall be applied to all wage rates, including those based on weight on drivers. Wage adjustments accompanying past reductions in the work week of yard employees shall be completely resurveyed to correct any remaining conversion inequities.

Basic Day

Seven (7) hours or less shall constitute a basic day. (This is intended to mean that employees shall be paid not less than the applicable daily rate whenever assigned, called or used.)

Work Week

The work week shall consist of five (5) consecutive work days with two (2) consecutive assigned days off each seven (7) days.

All time paid for at the time and one-half rate during any twenty-four (24) hour period in the work week shall not be used in computing the work week.

The work week of any employee shall be considered as starting on the first day on which he is assigned to render service after two (2) consecutive days off.

III. Overtime

A. Through Freight and Straightaway Passenger Service—Engine and Train Service Employees

Compensation at one and one-half times the applicable hourly or mileage rate shall be paid for miles run or time on duty, whichever is greater:

1. After the expiration of the hours constituting the basic day.
2. Outside the regular assignment, whether or not within the hours covered by the regular assignment.
3. On any off day.

Note: For the purpose of applying sub-paragraph 3 of this rule, the day on which a trip or tour of duty commences shall govern.

B. Short Turnaround Passenger Service—Engine and Train Service Employees

Compensation at one and one-half times the applicable hourly rate shall be paid for all time actually on duty, or held for duty:

1. In excess of seven (7) hours (computed on each run from time required to report for duty to the end of that run) within nine (9) consecutive hours; and also for all time in excess of nine (9) consecutive hours computed continuously from the time first required to report to the final release at the end of the last run. Time shall be counted as continuous service in all cases where the interval of release from duty at any point does not exceed one (1) hour. This rule applies regardless of mileage made.

2. Outside the regular assignment, whether or not such service is performed within the hours covered by the regular assignment.

3. On the sixth (6th) or seventh (7th) day of any work week.

C. All Other Road Service—Engine and Train Service Employees

Compensation at one and one-half times the applicable hourly or mileage rate shall be paid for miles run or time on duty, whichever is greater:

1. After the expiration of the hours constituting the basic day.
2. On any second assignment, call, or unit of work beginning within the calendar day in which the first unit of work started, or within ten (10) hours of the conclusion of the first unit of work, if that unit overlies a calendar day.
3. Outside the regular assignment, whether or not within the hours covered by the regular assignment.
4. On the sixth (6th) or seventh (7th) day of any work week.

D. Yard, Belt Line, Transfer and Hostler Service—Engine and Yard Service Employees

Compensation at one and one-half times the applicable hourly rate shall be paid for time on duty or held for duty:

1. After the expiration of the hours constituting the basic day.
2. On any assigned off (relief) day.
3. Outside the regular assignment, whether or not within the hours covered by the regular assignment.
4. To regular and extra employees working a second shift in a twenty-four (24) hour period.

IV. Guarantees

Apply to all regular and extra employees the following guarantees:

A. Engine Service Employees

Establish or amend rules, regulations or agreements to provide:

1. Through Freight and Straightaway Passenger Service

Engineers (motormen) and firemen (helpers) shall be guaranteed not less than the pay for twenty-six (26) basic days per month, exclusive of overtime and other compensation, at the average of graduated rates of pay applicable to the service in which engaged.

2. Short Turnaround Passenger Service

Engineers (motormen) and firemen (helpers) shall be guaranteed not less than the pay for five (5) basic days per week and twenty-two (22) basic days per month, exclusive of overtime and other compensation, at the average of graduated rates of pay applicable to the service in which engaged.

3. All Other Classes of Road Service

Engineers (motormen) and firemen (helpers), other than those set forth in sub-paragraphs 1 and 2, shall be guaranteed not less than the pay for five (5) basic days per week and twenty-two (22) basic days per month, exclusive of overtime and other compensation, at the average of graduated rates of pay applicable to the service in which engaged.

4. Yard, Belt Line, Transfer and Hostler Service

Engineers (motormen), firemen (helpers), hostlers and outside hostler helpers shall be guaranteed not less than the pay for five (5) basic days per week and

twenty-two (22) basic days per month, exclusive of overtime and other compensation, at the rate or average of graduated rates of pay applicable to the service in which engaged.

Note 1: An employee shall receive the prorata of the monthly guarantee, or guarantees, according to the class and grade of service in which engaged and work days he is available during the month in the application of the foregoing provisions.

Note 2: This shall not be construed as revising or abrogating daily, weekly or monthly guarantees which are considered by the employees to be more favorable on individual carriers.

B. Train and Yard Service Employees

Establish or amend rules, regulations or agreements to provide:

1. Through Freight and Straightaway Passenger Service:

All employees shall be guaranteed not less than the pay for twenty-six (26) basic days per month, exclusive of overtime and other compensation, at the rate or average of graduated rates of pay applicable to the service in which engaged.

2. Short Turnaround Passenger Service

Conductors and trainmen shall be guaranteed not less than the pay for five (5) basic days per week and twenty-two (22) basic days per month, exclusive of overtime and other compensation.

3. All Other Classes of Road Service

Employees other than those set forth in sub-paragraphs 1 and 2, shall be guaranteed not less than the pay for twenty-two (22) basic days per month, exclusive of overtime and other compensation, at the rate or average of graduated rates of pay applicable to the service in which engaged.

4. Yard, Belt Line and Transfer Service

All employees shall be guaranteed not less than the pay for five (5) basic days per week and twenty-two (22) basic days per month, exclusive of overtime and other compensation, at the rate of pay applicable to the service in which normally engaged.

Note 1: An employee shall receive the prorata of the monthly guarantee, or guarantees, according to the class and grade of service in which engaged and work days he is available during the month in the application of the foregoing provisions.

Note 2: This shall not be construed as revising or abrogating daily, weekly or monthly guarantees which are considered by the employees to be more favorable on individual carriers.

V. Split Trip Compensation

Establish rules to provide:

A. In short turnaround passenger service any assignment with an interval of release of more than one (1) hour shall be considered a split trip and shall be paid additional half time for all time in excess of a spread of ten (10) hours, computed from the time of first reporting for duty until time of final release, in addition to all straight time, overtime and other compensation otherwise provided.

B. In any other road service any assignment or combination of assignments having one or more intervals of release of less than ten (10) hours within or between such assignments shall be considered split trips. In addition to all other compensation, additional half time shall be paid on such split trips for all time in excess of ten (10) hours between the time of first reporting for duty and final release.

Note: This shall not be construed as revising or abrogating the provisions of automatic release rules, regulations or agreements, however established.

VI. Differential for Night Work

Establish rules to provide:

Employees in all classes of service shall be paid at ten percent (10%) of the applicable hourly rate (based on weight on drivers or cars hauled, where applicable) for all time on duty between the hours of 6:00 P.M. and 6:00 A.M., in addition to all other compensation.

Note: This shall not be construed as revising or abrogating the provisions of the starting time rules, regulations or agreements, however established.

VII. Arbitrariness and Special Allowances

Revise rules, regulations and agreements establishing arbitrariness and special allowances so that their equivalent shall be expressed in hours or minutes, which shall in the future be adjusted with basic hourly rates. Conversion from money or mileage to time equivalent shall be on an equitable basis but at not less than the relationship existing November 1, 1959.

VIII. Holidays With Pay

Establish or amend rules, regulations or agreements to provide that all employees shall be allowed holiday pay equivalent to one (1) basic day at the rate for the class of service in which last engaged for each of the following holidays:

New Year's Day
Washington's Birth-
day
Good Friday

Memorial Day
Independence Day
Labor Day

Veterans' Day
Thanksgiving
Christmas

Employees assigned, called or used on any such holiday shall be paid their holiday allowance as specified above and in addition thereto shall be paid at the rate of time and one-half for all services performed with a minimum of one and one-half times the rate for the basic day. Employees who have heretofore allocated part of their wage increases to be paid as though for holidays will have the amount thus allocated restored to their basic rates.

IX. Away-From-Home Terminal Expense

Establish or amend rules, regulations or agreements to provide that employees required to lay over at any point other than their home terminal shall be allowed for expenses incurred during such layover, one (1) hour's pay for layovers of four (4) hours or less; one (1) hour's pay for the next four (4) hours or less; and two (2) hours' pay for the next five (5) hours or less, such hourly pay to be computed at the rate of the last service performed. These payments to be cumulative, to be repeated for each twenty-four (24) hour period of any layover, and to be in addition to all other compensation.

X. Minimum Safe Crew Consist

Establish rules or agreements to provide:

A. Crews in all classes of road train service shall consist of not less than one (1) conductor and two (2) trainmen and such additional employees as are required to assure maximum safety.

B. Train and yard crews in yard, belt line and transfer service, shall consist of not less than one (1) conductor (foreman) and two (2) brakemen (helpers) and such additional employees as are required to assure maximum safety.

C. Crews in all classes of engine service shall consist of not less than one (1) engineer (motorman) and one (1) fireman (helper) and such additional employees as are required to assure maximum safety.

XI. Qualification and Training for Service-Engine Service Employees

Establish a uniform, progressive training program for locomotive helpers and apprentice engineers including training in the operation, maintenance and inspection (en route or in service) of all types of motive power and in safety of operations, jointly administered, as set forth in Appendix "A" [See Employees Exhibit No. 1].

Note: Progression under the training program shall be in the order set forth below:

1. Locomotive helper (trainee).
2. Locomotive helper.
3. Locomotive helper (apprentice engineer).
4. Locomotive engineer.

XII. Prohibition From Combining Services

Further combination of road and yard service shall be prohibited and nothing in these proposals shall be otherwise construed.

XIII. Implementations

Implementations of the foregoing rules in reference to exceptional situations, where necessary, may be made by agreement on individual properties.

XIV. Financial and Other Protection

The following provisions shall apply, in all instances in which the Washington Agreement of May, 1938, is not applicable, to all mergers, consolidations, unifications, or abandonments of facilities, or technological changes in operations, or changes in home terminals, home locations or other rearrangements or changes in operations or employee assignments, designed to or resulting in reduction of forces, displacement, loss of compensation or changed working conditions (hereinafter referred to as "effected change"), whether on any one carrier or more than one carrier.

- A. The number of employees in the service of the carrier shall not be reduced below the number in compensated service during the month of June, 1960, after deducting the number who have been removed from the payrolls after the effective date of this agreement as a result of death, normal retirements, or voluntary resignation, but not more in any one year than five per centum (5%) of the number in compensated service during June, 1960.

- B. 1. No employee shall be placed in a worse position with respect to compensation, rules, working conditions, or benefits than he occupied at the time of the effected change so long as he is unable in the normal exercise of his seniority rights under the existing collective bargaining agreement and under all related practices in effect to obtain a position producing compensation and related conditions and benefits equal to or exceeding those of the position held by him at the time of the effected change; provided, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under said agreement, supplements and practices which carry rates of pay, compensation, conditions and benefits exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.
2. The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced employee."
3. Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee during the highest year out of the last five (5) years and his total time paid for during said year in which he performed service immediately preceding the date of his displacement (such year being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, and he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.
4. The protection afforded herein shall only apply to displacements occurring within a period of five (5) years from the effective date of the effected change (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of five (5) years from the date on which the employee is displaced.
- C. 1. Any employee who is required to change the point of his employment and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, used in securing a place of residence in his new location.
2. The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is required to move his place of residence:
- (a) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value

or original cost whichever is higher. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the effected change to be unaffected thereby. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party. If housing at the new location is more costly, fair value shall represent the cost of comparable housing at the new location.

(b) If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

(c) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

Changes in place of residence subsequent to the initial change which grew out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

No claim for loss shall be paid under the provisions of this section which is not presented within five (5) years after the effective date of the employee's displacement.

Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conferences between the representatives of the employees and the carriers, and, in the event they are unable to agree, the dispute may be referred by either party to a board of three (3) competent real estate appraisers, selected in the following manner; one to be selected by the organization representing the employees and one by the carrier, respectively; these two (2) shall endeavor by agreement within ten (10) days after their appointment to select the third (3rd) appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third (3rd) appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third (3rd) or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

D. No employee shall be deprived of benefits due him under any provisions of the existing collective bargaining agreement or of any related practices providing conditions or benefits, including (but not limited to) hospitalization and medical benefits, pensions, free transportation, etc., under the same conditions, for the same period, and to the same extent to which such benefits or conditions are available to employees who have not been affected by the effected change.

E. Appropriate provisions shall be made for the following:

1. Dispute Committee or other procedure for the handling of disputes, controversies or grievances arising under the foregoing.
2. Protection relating to disciplinary procedure and physical examination.

XV. Stabilization of Employment

Any employee who has had compensated service in eight (8) or more months in any calendar year, and compensated service on the same railway (or predecessor railway) in any five (5) of the preceding ten (10) years shall be guaranteed twelve (12) months' employment in the succeeding year, with payment in each month of that succeeding year of not less than the monthly guarantee applicable to the class of service in which the employee holds seniority; providing, that this guarantee shall not apply to employees who resign voluntarily.

Note: The term "predecessor" shall be understood to include any railway, facility, or operation which has become a part of a successor railway.

XVI. Savings Clause

- A. Nothing herein shall eliminate or modify the provisions or bases for minimum separate or additional payment for required road or yard service such as, but not limited to, lap-back and side trips.
- B. In lieu of any one or more component parts of the foregoing proposals, existing rules, regulations, agreements, practices, or interpretations considered more favorable by the employees' committee on each individual railroad are preserved.

List of Carriers Involved in the Proceedings

List of Carriers Involved in the Proceedings

EASTERN RAILROADS

Akron & Barberton Belt
 Akron, Canton & Youngstown
 Ann Arbor
 Baltimore & Ohio
 B&O Chicago Terminal
 Staten Island Rapid Transit
 Strouds Creek & Muddlety
 Curtis Bay
 Bangor & Aroostook
 Bessemer & Lake Erie
 Boston & Maine
 Brooklyn Eastern District Terminal
 Buffalo Creek
 Bush Terminal
 Canadian National
 Lines in New England
 United States & Canada
 Champlain & St. Lawrence
 St. Clair Tunnel Co.
 Central RR. of New Jersey
 New York & Long Branch
 Central Vermont
 Chicago Union Station
 Cincinnati Union Terminal
 Delaware & Hudson
 Delaware, Lackawanna & Western
 Detroit & Toledo Shore Line
 Detroit Terminal
 Detroit, Toledo & Ironton
 Erie
 Grand Trunk Western
 Greenwich & Johnsonville
 Hoboken Shore
 Indianapolis Union
 Lake Terminal
 Lehigh & Hudson River
 Lehigh & New England
 Lehigh Valley

Long Island
 Maine Central
 Portland Terminal
 McKeesport Connecting
 Monon
 Monongahela
 Montour
 Youngstown & Southern
 Newburgh & South Shore
NEW YORK CENTRAL SYSTEM
 New York Central RR
 Eastern & New York Districts
 B&A Div of Eastern District
 Western District
 Northern District
 Southern District
 Pittsburgh & Lake Erie
 Lake Erie & Eastern
 Chicago River & Indiana
 Indiana Harbor Belt
 Cleveland Union Terminals
 New York, Chicago & St. Louis
 New York Dock
 New York, New Haven & Hartford
 Union Freight (Boston)
 New York, Susquehanna & Western
 Pennsylvania
 Baltimore & Eastern
 Pennsylvania-Reading Seashore Lines
 Pittsburgh & West Virginia
 Pittsburgh, Chartiers & Youghiogheny
 Reading
 Rutland
 Toledo Terminal
 Upper Merion & Plymouth
 Washington Terminal
 Western Maryland
 Youngstown & Northern

WESTERN RAILROADS

Alton and Southern RR.	Kansas City Terminal Ry.
Atchison, Topeka & Santa Fe Ry., The	Kansas, Oklahoma & Gulf Ry.
Gulf, Colorado & Santa Fe Ry	Midland Valley RR.
Panhandle & Santa Fe Ry.	Oklahoma City-Ada-Atoka Ry.
Bauxite & Northern Ry.	King Street Passenger Station (Seattle)
Belt Rwy. Co. of Chicago, The	Lake Superior & Ishpeming RR.
Butte, Anaconda & Pacific Ry.	Lake Superior Terminal & Transfer Ry.
Camas Prairie RR.	Longview, Portland & Northern Ry.
Chicago & Eastern Ill. RR.	Los Angeles Junction Ry.
Chicago & Illinois	Louisiana & Arkansas Ry.
Midland Ry.	Manufacturers Railway
Chicago and North Western Ry., incl. former CSTPM&O and L&M	Minneapolis & St. Louis Ry., The
Chicago & Western Indiana RR.	Minneapolis Ind. Rwy.
Chicago, Burlington & Quincy RR.	Railway Transfer Co. of the City of Minneapolis
Chicago, Great Western Ry., incl. South St. Paul Terminal	Minneapolis, Northfield & Southern Ry.
Chicago, Milwaukee, St. Paul & Pacific RR.,—Lines East	Minneapolis, St. Paul and Sault Ste. Marie RR.
Chicago, Milwaukee, St. Paul & Pacific RR.,—Lines West	Minnesota Transfer Ry., The
Chicago, Rock Island & Pacific RR.	Missouri-Kansas-Texas RR.
Chicago Short Line Ry.	Missouri Pacific RR.
Chicago, West Pullman & Southern RR.	Missouri-Illinois RR.
Colorado and Southern Ry.	New Orleans & Lower Coast Railroad
Davenport, Rock Island and North Western Ry.	New Orleans Union Pass. Term.
Denver & Rio Grande Western RR., The	Northern Pacific Ry.
Des Moines Union Ry.	Northern Pacific Term. Co. of Oregon
Duluth, Missabe & Iron Range Ry.	Northwestern Pacific RR.
Duluth, South Shore & Atlantic RR.	Ogden Union Ry. and Depot Co., The
Duluth Union Depot & Transfer Co.	Oregon, California & Eastern Ry.
Duluth, Winnipeg & Pacific Ry.	Pacific Coast RR.
East St. Louis Junction Railroad	Peoria and Pekin Union Ry.
Elgin, Joliet and Eastern Railway	Port Terminal Railroad Association
Ft. Worth and Denver Ry.	St. Joseph Terminal RR.
Joint Texas Div. of ORI&P RR and FtW&D Ry.	St. Louis-San Francisco Ry.
Galveston, Houston & Henderson RR.	St. Louis, San Francisco and Texas Ry.
Galveston Wharves	St. Louis Southwestern Ry.
Great Northern Ry.	St. Paul Union Depot Co., The
Green Bay & Western RR.	San Diego & Arizona Eastern Ry.
Kewaunee, Green Bay & Western RR.	Sioux City Terminal Ry.
Houston Belt & Term. Ry.	Southern Pacific Co. (Pacific Lines) excl. former El Paso & Southwestern System and Nogales, Arizona, Yard.
Illinois Central RR.	Southern Pacific Co. (Pacific Lines) former El Paso & Southwestern System
Illinois Northern Ry.	Southern Pacific Co. (Pacific Lines) Nogales, Arizona, yard
Illinois Terminal RR.	Spokane International RR.
Kansas City Southern Ry., The	
Arkansas Western Ry., The	

WESTERN RAILROADS—Continued

Spokane, Portland & Seattle Ry.	Texas Mexican Ry., The
Oregon Trunk Ry.	Texas-Pacific-Missouri Pacific Terminal RR. of New Orleans
Oregon Electric Ry.	Toledo Peoria & Western RR.
Terminal Railroad Assn. of St. Louis	Union Pacific RR.
Texas and New Orleans RR.	Union Ry. Co. (Memphis)
Texas and Pacific Ry., The	Union Terminal Co., The (Dallas)
Ablene & Southern Ry.	Wabash RR. (Lines West)
Ft. Worth Belt Ry.	Wabash RR. (Lines East)
Texas-New Mexico Ry.	Western Pacific RR., The
Texas Short Line Ry.	Wichita Terminal Association, The
Weatherford, Mineral Wells & Northwestern Ry., The	

SOUTHEASTERN RAILROADS

Atlantic Coast Line	Jacksonville Terminal
Atlanta & West Point	Kentucky & Indiana Terminal
Western Railway of Alabama	Louisville & Nashville
Atlanta Joint Terminals	Memphis Union Station
Birmingham Southern	Norfolk & Portsmouth Belt Line
Central of Georgia	Norfolk Southern
Chesapeake & Ohio	Norfolk & Western
Clinchfield	Richmond Fredericksburg & Potomac
Florida East Coast	Savannah Union Station
Fort Street Union Depot	Seaboard Air Line
Georgia	Tennessee Central
Gulf Mobile & Ohio	

APPENDIX D

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APPENDIX II

List of Appearances and Statements

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APPEARANCES ON BEHALF OF THE CARRIERS

BAUGMAN, George W.
Assistant to the President
Westinghouse Air Brake Co.

BUFFORD, Curtis D.
Vice President, Operations and Maintenance Department
Association of American Railroads

BURKS, Lloyd W.
Assistant Director of Labor Relations
Chesapeake and Ohio Railway Co.

CRUMP, Norris R.
Chairman and President
Canadian Pacific Railway Co.

DAVIS, J. L.
Assistant Director of Personnel
Louisville and Nashville Railroad Co.

DELLACANONICA, O. G.
Chief Engineer, International Operations
Alco Products Co.

DILWORTH, T. B.
Chief Engineer, Electro-Motive Division
General Motors Corp.

EGBERS, Alvin E.
Assistant to Vice-President-Operations (Labor Relations)
Chicago, Burlington & Quincy Railroad Co.

EMERSON, Robert A.
Vice-President
Canadian Pacific Railway Co.

GONDER, Douglas V.
Vice-President
Canadian National Railway Co.

GOULD, B. Ralph
Vice President and General Manager
Union Railroad Co.

GREER, Hugh E.
Secretary of the Committee on Labor Relations
Association of Western Railways

GRIMES, Robert L.
Trainmaster
Louisville and Nashville Railroad

HALLMAN, Ernest H.
Director of Personnel
Illinois Central Railroad

HAWKINSON, John T.
Manager, Audio-Visual Service (Personnel)
Illinois Central Railroad

HERDMAN, Eric B.
Director of Personnel
Denver & Rio Grande Western Railroad Co.

HOLLENBECK, M. W.
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Wabash Railroad Co.

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Association of American Railroads

KOSTER, Johan Pieter
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LEAHY, Ward H.
Operating Assistant to the General Manager of Transportation
New York Central System

APPEARANCES ON BEHALF OF THE CARRIERS—Continued

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Railways

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Division
Reading Railroad Co.

McINTYRE, M. A.

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Southern Pacific Co. (Pacific Lines)

MAGEE, Gerald M.

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Research Department, Association of
American Railroads

MALLERY, Guy E.

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Railroad Co.

MONROE, J. Elmer

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Association of American Railroads

MORE, Walter L.

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Railway System

MURPHY, W. D.

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way, Pa.)
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ORAM, James W.

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Relations
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QUARLES, Jr., W. D.

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Atlantic Coast Line Railroad Co.

ROBSON, John L.

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Department
Great Northern Railway Co.

SHORT, Theodore

Chairman, Western Carriers' Confer-
ence Committee and Chairman,
Committee on Labor Relations
The Association of Western Railways

SMALL, Jack

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portation
Louisville and Nashville Railroad Co.

SORENSEN, Joseph L.

Division Superintendent of General
Services
(Gary Plant), United States Steel
Corp.

SUHRIE, William B.

General Road Foreman of Engines
The Pennsylvania Railroad Co.

WATSON, Quentin D.

Secretary—Bureau of Railway Eco-
nomics
Association of American Railroads

APPEARANCES ON BEHALF OF THE OPERATING EMPLOYEE ORGANIZATIONS

BEATTIE, Donald S.
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Chicago, Milwaukee, St. Paul and
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of the General Committee of Ad-
justment, BLE
Denver and Rio Grande Western
Railroad

CLARK, Kenneth D.
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waukee, St. Paul and Pacific Rail-
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Chairman, Montana State Legislative
Board, BLF&E

COMBS, Lloyd A.
Switchman and General Chairman
Switchmen's Union of North America,
Great Northern Railway

DAVIDSON, Roy E.
Grand Chief Engineer
Brotherhood of Locomotive Engineers

DUGGAN, W. Paul
General Chairman of the General
Grievance Committee
BLF&E, Boston and Maine Railroad

DUNN, Walter P.
Locomotive Engineer
Boston and Maine Railroad

FALCONER, Charles E.
Yardmaster
Chicago, Milwaukee, St. Paul and
Pacific Railroad

FRANKLIN, Henry H.
Locomotive Engineer and General
Chairman of the BLF&E
Long Island Railroad

GILBERT, H. E.
International President, BLF&E

HEATH, Perry S.
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neer
Brotherhood of Locomotive Engineers

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way Conductors and Brakemen
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Chairman of the General Com-
mittee of Adjustment, BLE,
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APPEARANCES ON BEHALF OF THE OPERATING EMPLOYEE ORGANIZATIONS—Continued

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MOODY, Earl R.

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The Atchison, Topeka and Santa Fe Railway Company

NAGLE, Maurice F.

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OLIVER, E. L.

Labor Relations Consultant
Labor Bureau of Middle West

PELTON, Warren H.

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PLOCK, Henry G.

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REDMOND, James B.

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Baltimore & Ohio Railroad

RICHARDSON, Leon B.

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RITCHIE, Joseph W.

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Pennsylvania Railroad

SATTERWHITE, V. W.

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Brotherhood of Railroad Trainmen

SCHREVE, Lincoln

Locomotive Engineer
Santa Fe Railroad

SCHWARTZ, Louis E.

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BLE, Baltimore and Ohio Railroad

SKUTT, William E.

General Chairman, BLE
Hudson and Manhattan Railroad Co.

SMITH, Patricia Cain, Dr.

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Cornell University

SPENCER, Harold

Locomotive Engineer
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STROMMEN, Arnold M.

Locomotive Engineer and Local Chairman, BLF&E
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TIMMERMAN, Fred

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Southern Pacific Co. (Pacific Lines)

VAWTER, Howard M.

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Southern Pacific Co. (Pacific Lines)

WAGNER, Louis J.

President, Order of Railway Conductors and Brakemen

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New York Central System

APPEARANCES ON BEHALF OF THE OPERATING EMPLOYEE ORGANIZATIONS—Continued

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Locomotive Engineer
Chicago, Milwaukee, St. Paul and Pacific Railroad

ZUMWINKLE, V. S.
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Chairman (Lodge No. 501)
BLF&E, Great Northern Railroad

STATEMENTS SUBMITTED ON BEHALF OF THE CARRIERS

ABBEY, A. L.
Road Foreman of Engines
Terminal Railroad Association of St. Louis

BERRY, R. F.
Road Foreman of Engines
Norfolk and Western Railway Co.

BILLINGSLEY, G.
General Road Foreman of Engines
Southern District, Missouri Pacific Railroad Co.

BISHOP, B. W.
Assistant Superintendent, Portland Division
Southern Pacific Co.

BISHOP, Billy B.
Superintendent, Southern Division
Missouri-Kansas-Texas Railroad Co.

BROCK, G. P.
President
Gulf, Mobile & Ohio Railroad Co.

BUCK, H. K.
Superintendent—Memphis Division
Illinois Central Railroad

BURKS, Lloyd W.
Assistant Director of Labor Relations
Chesapeake & Ohio Railway Co.

GAIN, Robert M.
Road Foreman of Engines
Northern Pacific Railway

CHILDERS, L. B.
Traveling Engineer, Knoxville & Atlanta Divisions
Louisville & Nashville Railroad Co.

COPELAND, W. E.
General Road Foreman of Engines
The New York, New Haven and Hartford Railroad Co.

CORCORAN, William F.
Superintendent, Chicago Freight Terminal Division
Chicago and North Western Railway Co.

DIMMITT, R. J.
Assistant Superintendent
Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

DOMBROWSKI, John J.
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Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

DOYLE, Howard G.
Chief Mechanical Engineer
Missouri-Kansas-Texas Railroad Co.

DUTTON, W. M.
Vice-President and General Manager
Mississippi Export Railroad Co.

EGBERS, Alvin E.
Assistant to Vice-President—Operations (Labor Relations)
Chicago, Burlington and Quincy Railroad Co.

STATEMENTS SUBMITTED ON BEHALF OF THE CARRIERS—Continued

FORD, Harold M.

Air Brake Engineer and General
Road Foreman of Engines
Chicago, Burlington and Quincy
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Freight Train Master, Harrisburg
Division
The Pennsylvania Railroad Co.

GOEBEL, Frank J.

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Baltimore & Ohio Railroad Co.

GOULD, B. Ralph

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Union Railroad Co.

GREER, Hugh E.

Secretary of the Committee on Labor
Relations
Association of Western Railways

GURLEY, F. G.

Former Chairman and President
The Atchison, Topeka and Santa Fe
Railway System

HAVERTY, Albert P.

Road Foreman of Engines
The Washington Terminal Co.

HOPKINS, Robert W.

Terminal Superintendent at Denver
Union Pacific Railroad

HUGHES, Elliott M.

General Superintendent
Birmingham, Southern Railroad Co.

JOHNSON, R. E.

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Operating Officer
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Railroad Co.

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Manager of Transportation
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LOVELL, John W.

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Louisville and Nashville Railroad Co.

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Pacific Railroad

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Chicago, Rock Island and Pacific
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MONROE, J. Elmer

Vice President (Director of the Bu-
reau of Railway Economics)
Association of American Railroads

MORE, Walter L.

Vice President—Personnel
The Atchison, Topeka and Santa Fe
Railway System

ORLOMOSKI, Joseph F.

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Chicago, Rock Island and Pacific
Railroad Co.

STATEMENTS SUBMITTED ON BEHALF OF THE CARRIERS—Continued

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QUINN, Michael M.
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New York Region
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REYNOLDS, Frank
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ment
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RYLE, J. A.
Trainmaster—Road Foreman of En-
gines
Central of Georgia Railway Co.

SASGEN, Peter J.
System Diesel Supervisor
The Pennsylvania Railroad Co.

SHOBER, R. H.
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sion
Great Northern Railway Co.

SPORE, R. D.
Superintendent of Transportation
The Long Island Rail Road Co.

STACK, Robert F.
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master
Florida East Coast Railway Co.

STONE, George W.
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The Texas and Pacific Railway Co.

STONE, Preston V.
Assistant Superintendent—Coast Di-
vision
Southern Pacific Co.

SUHRIE, William B.
General Road Foreman of Engines
The Pennsylvania Railroad Co.

SURLES, H. J.
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WALSH, Joseph R.
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The Central Railroad Co. of New
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WHITE, William
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The Delaware and Hudson Railroad
Co.

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The Texas and Pacific Railway Co.

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EMPLOYEE ORGANIZATIONS

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Railroad

ANDERSON, Donald H.
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Chicago River and Indiana Railroad

ANDERSON, James
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Brotherhood of Railroad Trainmen

ANDERSON, Leo R.
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Washington Terminal Company
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STATEMENTS SUBMITTED ON BEHALF OF THE OPERATING
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BACKUS, Martin

Locomotive Fireman
Norfolk & Western Railroad

BALKANYI, Frank H.

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Chairman
BLF&E, Texas and Pacific Railway
Co.

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Pacific Railroad

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of the General Grievance Commit-
tee
Brotherhood of Locomotive Fire-
men and Enginemen, Northern Pa-
cific System

BROWN, Paul E.

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Quincy Railroad Co.

CASHION, John A.

Locomotive Engineer
Florida East Coast Railway

CLARK, Kenneth D.

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waukee, St. Paul and Pacific Rail-
road—Chairman, Montana State
Legislative Board, BLF&E

COZORT, Phillip J.

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Norfolk and Western Railroad

CROCKRELL, James W.

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Mississippi Export Railroad

DARDEN, Robert J.

Locomotive Engineer
Central of Georgia Railroad Co.

DAVIDSON, James T.

Locomotive Fireman
Norfolk & Western Railroad

DEERING, D. C.

General Chairman, Brotherhood of
Locomotive Firemen and Engi-
nen
Chicago and North Western Railway

DILLE, J. D.

Local Chairman, BLE
Hudson Electric Sub-Division, New
York Central Railroad

DISHNER, Roy E.

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Norfolk & Western Railroad

DONNELLY, John T.

Locomotive Fireman
Pennsylvania Railroad

DUBOSE, L. A.

Locomotive Fireman
Louisville and Nashville Railroad Co.

DUNN, Walter P.

Locomotive Engineer
Boston and Maine Railroad

STATEMENTS SUBMITTED ON BEHALF OF THE OPERATING EMPLOYEE ORGANIZATIONS—Continued

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Pacific Railroad Co.

FALKINBURG, John L.
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Pennsylvania Railroad

FISHER, P. E.
Local Chairman (Lodge No. 824),
BLF&E, Monongahela Connecting
Railroad

FRANKLIN, Henry H.
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Chairman, BLF&E
Long Island Railroad

GEIGER, Marvin L.
General Chairman, BLE
Seaboard Air Line Railroad

GILBERT, H. E.
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Brotherhood of Locomotive Firemen
and Enginemen

GOLDEN, Jr., James L.
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Chairman, BLF&E
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GREEN, R. J.
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Locomotive Firemen and Engi-
men
Eastern District, Union Pacific Rail-
road

GUINEA, Edgar R.
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HARKINS, T. J.
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Brotherhood of Locomotive Engi-
neers

HARP, Autry A.
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HEATH, Perry S.
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neer
Brotherhood of Locomotive Engi-
neers

HICKEY, Walter M.
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HICKS, John C.
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HOWELL, Fred
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Illinois Central Railroad

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KENYON, Howard G.
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PYLIEGER, Carl
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STATEMENTS SUBMITTED ON BEHALF OF THE OPERATING EMPLOYEE ORGANIZATIONS—Continued

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Alliquippa and Southern Railroad

REDMOND, James B.
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cific Railroad Co.

RICHARDSON, Leon B.
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men's Union of North America,
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verleaf Districts

SATTERWHITE, V. W.
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Brotherhood of Railroad Trainmen

SCHOENING, John M.
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Denver and Rio Grande Western
Railroad

SCHWARTZ, Louis E.
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Chairman (Division No. 36)
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SCHWEMMER, Frederick H.
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Pennsylvania Railroad

SHIMEL, Walter F.
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SHATTUCK, Jess L.
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SNYDER, Waldo A.
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Railroad Yardmasters of America,
Union Pacific Railroad

SOUTHERN, W. F.
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Pennsylvania Railroad

STANLEY, Roy T.
Locomotive Fireman
Texas and Pacific Railway Co.

STEMRICH, James
Locomotive Engineer
Central Railroad Co. of New Jersey

STEVENSON, R. A.
Locomotive Engineer
Union Pacific Railroad

STATEMENTS SUBMITTED ON BEHALF OF THE OPERATING
EMPLOYEE ORGANIZATIONS—Continued

STROMMEN, Arnold M.
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Chairman, BLF&E
(Lodge 95) Great Northern Railway

THOMPSON, Roy R.
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THOMPSON, S. D.
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Brotherhood of Locomotive Engi-
neers

TIMMERMAN, Fred
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VAWTER, Howard M.
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VICK, Simeon C.
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Chairman, BLF&E
Norfolk and Western Railway

VICKERS, Sanford
Locomotive Engineer
Southern Pacific Co.

WALTERS, T. M.
Vice President
Order of Railway Conductors and
Brakemen

WATTS, Charles W.
Locomotive Engineer
New York Central Railroad

WHITEWORTH, T. A.
Locomotive Fireman and Engineer
Southern Railway

WILKERSON, William H.
Locomotive Engineer
Chicago, Milwaukee, St. Paul and
Pacific Railroad

WILLIAMS, Norman O.
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Norfolk & Western Railroad

WOODS, Robert Edward
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Norfolk & Western Railroad

YOUNG, Bernard W.
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Local 133,
Switchmen's Union of North
America
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western Railway Co.

ZUMWINKLE, V. S.
Locomotive Engineer and Local
Chairman (Lodge No. 501),
BLF&E
Great Northern Railway Co.

MEMBER FOR THE AMERICAN

Mr. C. E. Taylor
Mr. E. E. Taylor
Mr. E. E. Taylor

Robert L. Jones
Martin M. Jones
Robert L. Jones
Robert L. Jones

MEMBER FOR THE AMERICAN

Mr. E. E. Taylor
Mr. E. E. Taylor

Robert L. Jones
Martin M. Jones

APPENDIX E

List of Counsel

STATEMENT OF RECEIPTS AND DISBURSES OF THE GENERAL LAND OFFICE

RECEIPTS	DISBURSES
<p>From Sales of Land 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>For Salaries and Wages 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>From Interest on Bonds 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>For Interest on Bonds 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>From Dividends on Stocks 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>For Dividends on Stocks 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>From Other Sources 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>For Other Sources 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Total Receipts 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Total Disburses 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Balance Forward 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Balance Forward 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Total 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Total 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Balance on Hand 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Balance on Hand 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Balance Due 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Balance Due 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Balance Due 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Balance Due 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>
<p>Balance Due 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>	<p>Balance Due 1890-91 \$1,234,567.89 1891-92 \$2,345,678.90 1892-93 \$3,456,789.01</p>

APPENDIX A
 List of Council

COUNSEL FOR THE CARRIERS

Basil Cole
Robert Diller
Joseph B. Geyer
Charles L. Hopkins, Jr.

Robert L. Jones
Martin M. Lucente
Howard Neitzert
James R. Wolfe

COUNSEL FOR THE ORGANIZATIONS

Alex Elson
Harold C. Heiss
Martin K. Henslee
Max Mallin

H. N. McLaughlin
Harry Wilmarth
Aaron Wolff

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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, ORDER OF RAILROAD CONDUCTORS
AND BRAKEMEN, and SWITCHMEN'S UNION OF
NORTH AMERICA, *Appellants and Intervenors*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN RAIL-
WAY COMPANY, MISSOURI PACIFIC RAILROAD
COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY, ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF AR-
KANSAS

JURISDICTIONAL STATEMENT

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UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D. C.

TO THE HONORABLE SECRETARY OF THE INTERIOR
FROM THE HONORABLE SECRETARY OF THE INTERIOR

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THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
IN TWO VOLUMES
BY NATHANIEL BENTLEY
VOLUME II
CONTAINING THE HISTORY FROM
THE YEAR 1700 TO THE PRESENT
TIME
PUBLISHED BY
JOHN BENTLEY
AT THE SIGN OF THE
CROWN IN THE
MARKET PLACE
1790

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. _____

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, ORDER OF RAILROAD CONDUCTORS
AND BRAKEMEN, and SWITCHMEN'S UNION OF
NORTH AMERICA,** *Appellants and Intervenors*

v.

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN RAIL-
WAY COMPANY, MISSOURI PACIFIC RAILROAD
COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY, ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY,** *Appellees*

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF AR-
KANSAS**

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Western District of Arkansas entered March 8, 1965, enjoining enforcement of Ark. STAT. ANN. §§ 73-720 through 722, 73-726 through 729 (1947), and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The majority and minority opinions and judgment of the District Court for the Western District of Arkansas, Hot Springs Division, are not yet reported. Copies of the opinions and judgment are attached hereto as Appendix A.

JURISDICTION

This action was brought under 28 U. S. C. §§ 1331, 1332, 2201, 2202 and 2281 through 2284 to invalidate statutes of the State of Arkansas regulating the composition of certain railroad crews. The grounds alleged for such invalidation include various provisions of the United States Constitution; a three-judge court was empanelled. The appellees filed a motion for summary judgment based upon supremacy clause, commerce clause and equal protection constitutional contentions. In opinions filed March 5, 1965, a two-judge court majority held that the challenged state action had been preempted by exercise of congressional power. Judgment enjoining the enforcement of the state statutes was filed on March 8, 1965.

Notice of appeal was filed by the appellants and intervenors on March 17, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime Growers, Inc. v. Jacobsen*, 362 U. S. 73 (1960); *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89 (1935). See also *Kesler v. Department of Public Safety*, 369 U. S. 153 (1962); *Missouri Pac. R. R. v. Norwood*, 283 U. S. 249 (1931).

QUESTION PRESENTED

Did the United States Congress, by the enactment of Public Law 88-108, 77 STAT. 132, which required arbitration for resolution of a pending dispute between certain railroads and unions, exercise a constitutional power to deprive the State of Arkansas of power to enforce ARK. STAT. ANN. §§ 73-720 through 722, 73-726 through 729 (1947), portions of the state railroad safety laws which regulate

the employment complement of certain freight trains and switch crews operating in the state?

STATUTES INVOLVED

Public Law 88-108, 77 STAT. 132, 45 U. S. C. A. § 157 (Supp. 1964), and ARK. STAT. ANN. §§ 73-720 through 722, 73-726 through 729 (1947), are set forth in Appendix B hereto.

STATEMENT

The statutes challenged in this case are two of a series of three passed by the General Assembly of Arkansas between 1907 and 1913 delineating minimum train crews for certain conditions of railroad operation in the state. ARK. STAT. ANN. §§ 73-720 through 729 (1947). The series is part of a statutory chapter on "equipment of railroads—safety provisions." ARK. STAT. ANN. §§ 73-701 through 744 (1947).

Act 116 of 1907, ARK. STAT. ANN. §§ 73-720 through 722 (1947), requires a minimum crew of an engineer, a fireman, a conductor and three brakemen for freight trains, except for small companies or short trains. Act 67 of 1913, ARK. STAT. ANN. §§ 73-726 through 729 (1947), requires a minimum crew of an engineer, a fireman, a foreman and three helpers for switch trains operating in large communities, except for small companies.

The appellees are six large interstate railroad companies. Their complaint to a three-judge court in the Western District of Arkansas sought an injunction against the enforcement of the statutes applicable to freight and switch crews, as violative of the due process and equal protection clauses of the Fourteenth Amendment and the commerce and supremacy clauses of the United States Constitution. The complaint conceded that the Arkansas statutes have been upheld in the past against similar contentions, but alleged that changes in operating conditions and expanded federal occupation of the field make prior holdings inapplicable. The primary basis of the latter argument was the 1963 passage by the United States Congress of Public Law

88-108, 77 STAT. 132. Public Law 88-108, enacted to prevent disruption of essential national transportation services over a dispute which had not been susceptible of settlement through extant mediation procedures, established an arbitration panel to resolve specified issues involving employment by certain railroads.

Intervention was granted to the appellants, five national unions which represent several thousand operating employees of the appellees in Arkansas. The intervenors and the Attorney General of the state denied all vital allegations of the complaint, and alleged that the challenged statutes protect the public safety in a manner within the power of the state to effectuate. Discovery proceedings were suspended upon the filing by the appellees of a motion for summary judgment based upon supremacy clause, commerce clause and equal protection contentions.

In opinions dated March 5, 1965, the court found genuine issues of material fact barring summary disposal of the commerce clause and equal protection issues. On the supremacy clause issue, two of the three judges held that the Arkansas statutes are "in substantial conflict with Public Law 88-108 . . . and the proceedings thereunder, and are therefore unenforceable." The third judge dissented, relying upon "prior specific holdings in the earlier cases . . . and the favored position given by the Supreme Court to state safety statutes." Judgment was filed March 8, 1965, enjoining enforcement of the challenged measures. On March 27, 1965, Mr. Justice Byron R. White ordered the injunction stayed pending action of this Court upon the jurisdictional aspect of the case, and on April 2, 1965, declined to modify the stay order.

THE QUESTIONS ARE SUBSTANTIAL

This is at least the fourth time that the half-century campaign of railroad companies to eliminate the Arkansas laws "providing for full train crews" has reached this Court. See *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 779 (1945).

The statute providing for full crews on freight trains was alleged to be an unconstitutional regulation of com-

merce, a denial of equal protection of the laws, and deprivation of property without due process of law in *Chicago, R. I. & Pac. Ry. v. Arkansas*, 219 U. S. 453 (1911). The statute providing for full switch crews was challenged on the same grounds in *St. Louis, I. M. & S. Ry. v. Arkansas*, 240 U. S. 518 (1916). Both were attacked on the same grounds plus allegations of federal preemption by the Interstate Commerce Act and the Railway Labor Act in *Missouri Pac. R. R. v. Norwood*, 283 U. S. 249 (1931), 290 U. S. 600 (1933).

Under all of these decisions, there is no constitutional impairment to the enforcement of the very statutes under attack in this case. Their classifications are reasonable, their safeguards legitimate, and "[i]n the absence of a clearly expressed purpose to do so Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews." 283 U. S. at 256.

This Court consistently has refused to substitute its judgment on the safety of Arkansas railroads for that of the General Assembly of Arkansas. (So also have the people of the state, who rejected proposed Initiated Act No. 1 of 1958, an attempt to repeal the three full crew statutes, by a vote of 162,748 to 130,465. Election Files, Arkansas Secretary of State (Nov. 4, 1958).)

Now the railroads try again. Their newest allegations of changed operations were not determined in the case at bar, as two judges below were convinced that as a matter of law Congress now has so occupied the field as to prevent enforcement of the Arkansas statutes.

1. At least for purposes of the present posture of this case, the Arkansas full crew statutes are calculated to maintain the public safety. *Missouri Pac. R. R. v. Norwood*, *supra*; *Chicago, R. I. & Pac. Ry. v. Arkansas*, *supra*. Any effect of factually changed operations on such prior conclusions was not reached below. While the purpose of the statute is not determinative of preemption questions, it is clear, in the words of Circuit Judge Van Oosterhout, that this Court has given a "favored position" to "state safety statutes."

A dominant decision on the preemptive effect of federal railway labor legislation on state safety regulations is *Terminal R. R. Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943). This Court reasoned:

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a demand by workmen for better protection which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. *But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation.* 318 U. S. at 6-7. (Emphasis added.)

The Arkansas full crew law trilogy illustrates the permissible situation in which "a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the movement of trains." *Southern Pac. Co. v. Arizona*, 325 U. S. 761, 779 (1945).

Federal preemption of labor relations has expanded in recent years, especially where the state action purports to regulate the bargaining process regulated by federal law. *E.g., California v. Taylor*, 353 U. S. 553 (1957); *Railway Employes' Dept. v. Hanson*, 351 U. S. 225 (1956). But this Court has continued to recognize the power of the state to police its streets and highways. *E.g., Allen-Bradley Local 1111 v. Wisconsin Employment Rel. Bd.*, 315 U. S. 740 (1942); *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957). See also *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960). Federally adjusted labor-management issues have a different relationship to local health or safety regulations than to "state policy

which seeks specifically to adjust relationships in the world of commerce." *Local 24, International Bro. of Teamsters v. Oliver*, 358 U. S. 283, 297 (1959).

The safety purpose of the Arkansas full crew laws is the context in which an examination of the allegedly preemptive federal action should be undertaken. A recent analogous discussion of preemption principles affords two material measures: (a) is there such actual conflict between the two schemes of regulation that both cannot stand in the same area, or (b) is there evidence of a congressional design to preempt the field? *Florida Lime Growers, Inc. v. Paul*, 373 U. S. 132, 141 (1963).

2. Public Law 88-108 and the Arkansas full crew laws "stand in the same area" only if employment of railroad personnel is considered generically as a single area of legislative concern. Assuming, *arguendo*, such identity, there is no actual or potential conflict between the two schemes of regulation because of impossibility of compliance with both, or any other inevitable collision.

The federal enactment grew out of a dispute between certain railroads and unions over the use of firemen on other than steam powered locomotives and the consist of road and yard crews. The matter could not be resolved through established mediation procedures, and the parties were left to economic self-help. *Brotherhood of Locomotive Engineers v. Baltimore & O. R. R.*, 372 U. S. 284 (1963). Because of the judgment of the executive and legislative branches of the federal government that a widespread railroad strike could not be tolerated in the national interest, Congress established a single compulsory arbitration proceeding by its joint resolution.

Pursuant to the congressional action, Arbitration Board No. 282 was established, took testimony and issued an award. *Eastern, Western, and Southeastern Carriers' Conf. Comm. and Brotherhood of Locomotive Engineers*, 41 LAB. ARR. 673 (1963) (exhibit 4 to motion for summary judgment). Generally, the award permitted certain reductions in the employment of firemen, referred certain remaining crew consist issues to special local arbitration panels, and

established benefits for certain employees damaged by such action. See *Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R. R.*, 225 F. Supp. 11 (D. D. C. 1964), *affmd.*, 331 F. 2d 1020 (D. C. Cir. 1964), *cert. den.*, 377 U. S. 918 (1964). Local panels have also issued awards on specific issues referred to them. See, e.g., exhibit 5 to the motion for summary judgment; *Brotherhood of Railroad Trainmen v. Missouri Pac. R. R.*, 230 F. Supp. 197 (E. D. Mo. 1964).

Comparison of the products of these two regulatory schemes reveals that compliance with the Arkansas full crew statutes is precisely as exacting for the railroads since the passage of Public Law 88-108 as it was before.

It is hard to understand how the lower court found support for its holding in *Florida Lime Growers, Inc. v. Paul*, *supra*. There, as here, the state test may have been more difficult to satisfy than the federal test. But the fact that the tests are different "poses, rather than disposes, of the problem." 373 U. S. at 141. (The problem would be different if the federal legislation required certain *maximum* crews which were smaller than the *minimum* required by the state.) Obviously there is no physical impossibility of compliance with both; the appellees did exactly that for a year prior to the decision below. "Thus the present record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of standards." 373 U. S. at 143.

The majority below concludes that Public Law 88-108 and subsequent proceedings were so pervasive that state action is barred by implication. The mere fact that federal and state statutes have similar purposes is not enough to preempt. *Colorado Anti-Discrimination Commn. v. Continental Air Lines, Inc.*, 372 U. S. 714 (1963). In any event, the distinctive character of the new federal action is that it is expressly and precisely limited.

Public Law 88-108 and Arbitration Award No. 292 apply only to certain railroads and unions. See, e.g., exhibit 2 (at 307-09) to motion for summary judgment (Southern Ry. excluded); *Division 700, Brotherhood of Locomotives*

Engineers v. National Railway Labor Arb. Bd., 224 F. Supp. 366 (D. D. C. 1963) (Union R. R. excluded). They deal only with two carefully defined issues. They are temporally limited: the legislation expired one hundred and eighty days after its enactment, and the award exists for two years. All significant characteristics negate pervasiveness.

3. A second fundamental preemption consideration is evidence of congressional design. The question, of course, is not what Congress could or should have done, but what it did. Unambiguous language in the legislative record rebuts any inference of intent to preempt.

Public Law 88-108 does not mention state full crew regulations. Its terms relate to the establishment, operation and termination of an arbitration board. Its legislative history is replete with authoritative statements that state full crew laws would not be affected. The Secretary of Labor explained the executive recommendations:

The intention . . . would be that State railroad full crew laws would not be affected. I am obviously not in a position to foreclose any question of interpretation which might arise but our investigation has gone to the extent of consideration of whatever case law might seem to bear most directly on that and wanting to observe the propriety of not foreclosing any question on that. I call attention to such statements as those of the *Missouri Railroad Company v. Norwood*, the Supreme Court case in 1930 in which the Court said, "In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent the assertion of the police power of the States for the regulation of the number of men to be employed in such crews." It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law.

Hearings on H. J. Res. 565 (Railroad Work Rules Dispute), Committee on Interstate and Foreign Commerce, House of

Representatives, 88th Cong., 1st Sess. 78. The committee adopted this intention:

The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

H. R. REP. No. 713, 88th Cong., 1st Sess. 14 (1963). See also S. REP. No. 459, 88th Cong., 1st Sess. 7 (1963).

On the floor of the House, the Chairman of the Commerce Committee was queried further about the scope of the measure. After explaining committee consideration of the preemption point, he forcefully declaimed:

Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill. I think that is about as clear as we can make it.

109 CONG. REC. 16122 (1963).

If, as appellees contend, Arbitration Award No. 282 also reflects congressional intent, its scope is thoroughly consistent. The board noted its narrow jurisdiction, then proceeded to an explicit award on the firemen issue. Its deleterious effect on employment was a major consideration of the panel members. They noted expressly that the intrinsic award was not as severe as indicated by its face because "a number of States, by law or administrative regulations, require the use of firemen in road freight or yard service." 41 LAB. ARB. at 690.

The arbitration board decided that issues involving other crew members peculiarly were subject to local conditions and a nationwide award would be inappropriate. In ordering the establishment of special local arbitration boards, it directed such tribunals to be "governed," *inter alia*, by "State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections." 41 LAB. ARB. at 679.

Not only are state full crew laws consistent with the federal regulation. They virtually are incorporated, as

benchmarks indicating the boundary of that regulation. See *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502 (1962).

As with prior federal railway labor legislation, the administrative boards "act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers." *Terminal R. R. Assn. v. Brotherhood of Railroad Trainmen*, *supra*, 318 U. S. at 6. "The most plausible inference from the legislative scheme is that the Congress contemplated that state power to enact such regulations should remain unimpaired." *Florida Lime Growers, Inc. v. Paul*, *supra*, 373 U. S. at 152.

4. The substantiality of the question on this appeal is bolstered by current pendency of the same question in a volume of similar litigation. *United States v. Standard Oil Co.*, 332 U. S. 301, 302, n. 2 (1947); *United States v. Powell*, 330 U. S. 238, 240 (1947).

The case at bar is part of a national assault on full crew laws of a number of states. An authoritative expression on the question presented as to the Arkansas statutes would, as did past full crew rulings which arose from Arkansas, be of substantial assistance to the judiciary considering the preemption question in pending cases at several levels and jurisdictions. *E.g.*, *Chicago, M., St. P. & Pac. R. R. v. Pearson*, No. 6214 (E. D. Wash.) (REV. CODE WASH. §§ 81.40.020, 81.40.030 (1951)); *New York Cen. R. R. v. Lefkowitz*, No. 6024/1961 (Sup. Ct. N. Y., Westchester County) (McKINNEY'S CONSOL. LAWS N. Y., Book 48, §§ 54-a, 54-b, 54-c (1952)); *New York Cen. R. R. v. Public Service Comm.*, No. S64-3643 (Marion County, Ind., Super. Ct.) (BURNS IND. STAT. ANN. §§ 55-1326 through 1338 (Eopl. Vol. 1951)).

It is submitted that the court below has failed to perceive this particular constitutional relationship between exerted federal power to regulate labor-management disputes and established state power to protect the safety of its citizens from hazards of an industry which is vital to

the welfare of the nation. Appellants believe that the question presented by this appeal is substantial and of public importance.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN RAILWAY
COMPANY, MISSOURI PACIFIC RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and
THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiffs,*

v.

Civil Action No. 944

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR
THE SEVENTH JUDICIAL CIRCUIT OF ARKANSAS,
SUCCESSOR IN OFFICE TO LAWSON E. GLOVER,
AND JOHN W. GOODSON, PROSECUTING ATTORNEY
FOR THE EIGHTH JUDICIAL CIRCUIT OF ARKANSAS,
Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHER-
HOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF
RAILWAY CONDUCTORS AND BRAKEMEN, AND SWITCH-
MEN'S UNION OF NORTH AMERICA, *Intervenors.*

BEFORE VAN OOSTERHOUT, Circuit Judge, and MILLER
and HENLEY, District Judges.

JOHN E. MILLER, District Judge

Opinion

Plaintiffs' motion for summary judgment under the provisions of Rule 56, Fed. R. Civ. P., is before the court for disposition. The parties have served and submitted elaborate and thorough briefs in support of their respective contentions, and none of the parties has requested oral argument, but in view of the extensive briefs, the court

does not believe any useful purpose would be served by oral argument and the motion has been considered upon the exhibits thereto, the affidavits, the pleadings and briefs.

Before discussing the questions presented by the motion, we believe it would be helpful to briefly outline the pleadings, other motions filed by intervenors prior to the filing of the motion for summary judgment, and the action of the court on such motions.

The complaint was filed April 10, 1964.¹ Paragraphs 1, 2 and 3 of the complaint are jurisdictional allegations. Paragraph 4 contains allegations of identity of the plaintiffs, and alleged that they are engaged in the transportation of property in interstate commerce over railroads which they own and operate in the State of Arkansas and numerous other states; that each plaintiff owns and operates lines more than 100 miles in length, regularly operates freight trains in Arkansas consisting of more than 25 cars, and regularly conducts switching operations in cities of the first and second class across public crossings, that by reason of such operations they are subject to the provisions of Act 116 of the Acts of Arkansas of 1907, Exhibit A² to complaint, and Act 67 of the Acts of Arkansas of 1913, Exhibit B³ to complaint.

¹ All dates referred to are of the year 1964 unless otherwise noted.

² Sections 1, 2 and 3 of Act 116 of 1907 appear as Sections 73-720 to 73-722, inclusive, Ark. Stat. Ann. (1957 Repl.), and are as follows:

"73-720. *Crew required on freight trains.*—No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

"73-721. *Exceptions from act—Purpose.*—This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent

Paragraph 5 identifies the defendants as Prosecuting Attorneys in their respective circuits of Arkansas, and it is alleged therein that by virtue of the duties imposed upon them by law and by virtue of their oaths of office, they are threatening to enforce the penalties of these Acts and will enforce the penalties unless restrained by this court.

In paragraphs 6, 7 and 8 it is alleged:

any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

"73-722. *Penalty for violations—Exceptions.*—Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved."

Section 4 of Exhibit A merely repeals all laws and parts of laws in conflict therewith.

Sections 1, 2, 3 and 4 of Act 67 of 1913, Exhibit B, appear as Sections 73-726 to 73-729, inclusive, Ark. Stat. Ann. (1957 Repl.), and are as follows:

"73-726. *Switch crews in cities—Requisite members.*—No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operated their switch crew or crews with less than one (1) engineer, a fireman, a foreman and three (3) helpers.

"73-727. *Purpose of act—Number in crew may be increased.* It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one (1) engineer, a fireman, a foreman and three (3) helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this Act.

"73-728. *Application of act to cities of first and second class—Exception.*—The provisions of this Act shall only apply to cities of first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred (100) miles in length.

"73-729. *Penalty for violation of act.*—Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars (\$50.00), and each crew so illegally operated shall constitute a separate offense."

Section 5 merely provides that the Act shall take effect and be in force after May 1, 1913. However, Section 5 was probably in conflict with Amendment No. 10 to the Constitution of Arkansas, known as the Initiative and Referendum Amendment. See *Arkansas Tax Commission v. Macra*, 108 Ark. 48, 145 S. W. 109 (1912).

"(6) As applied to these plaintiffs, these Acts are in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they are arbitrary, capricious, discriminatory and unreasonable in their operation and bear no reasonable relationship to the purported purpose of safety to employees and the public.

"(7) As applied to these plaintiffs, these Acts are in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution in that they single out the railroad industry in the State of Arkansas, of which plaintiffs are a part, and impose by statute upon it alone, arbitrary, inflexible requirements as to the minimum number of employees which must be assigned in its business as therein provided.

"(8) As applied to these plaintiffs, these Acts are in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause, in that they impose upon plaintiffs' conduct of interstate commerce unreasonable and arbitrary requirements constituting a direct interference with, burden upon, and impediment of such commerce, and in that they greatly and unreasonably increase plaintiffs' operating costs within the State of Arkansas. . . . In addition to the financial burden imposed on plaintiffs by these Acts, they further operate to unduly and unreasonably burden interstate commerce in that some plaintiffs are required to stop or slow interstate trains at various points entering and leaving the State of Arkansas for the sole purpose of loading or unloading employees who are unnecessary to the safe and efficient operation of these trains, and such interstate commerce is therefore unreasonably delayed."

In paragraph 9 it is alleged that the Acts are also in violation of the Commerce Clause in that they discriminate against interstate commerce in favor of local or intrastate commerce. Act 116 of 1907 applies only to plaintiffs and seven other interstate railroads operating in Arkansas, because each of the twelve interstate railroads operating in Arkansas owns and operates in excess of 50 miles of line;

the Act exempts all sixteen of the intrastate railroads operating in Arkansas because each has less than 50 miles of line; Act 67 of 1913 exempts all intrastate railroads and penalizes only plaintiffs and two other interstate railroads with at least 100 miles of line; and this classification "constitutes a direct, substantial and discriminatory burden upon interstate commerce.

Paragraphs 10, 11, 12 and 13 deal only with prior litigation⁴ concerning these Acts, and paragraph 13 concludes:

⁴The first attack upon Act 116 of 1907 is reported in *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 86 Ark. 412, 111 S. W. 456 (1908). The attack was predicated upon the claim that the Act attempted to regulate interstate commerce, that it was arbitrary, unreasonable and contrary to the Due Process Clause of the Fourteenth Amendment, and that it was in violation of the Equal Protection Clause of the Constitution. The Act was sustained by the Supreme Court of Arkansas, and upon appeal the Supreme Court of the United States affirmed. 219 U. S. 453, 31 S. Ct. 275, 55 L. Ed. 290 (1911). At page 466 of 219 U. S., the court said:

"Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and state."

In *St. L. & Iron Mtn. Ry. v. Arkansas*, 114 Ark. 486, 170 S. W. 580 (1914), Act No. 67 of 1913 was attacked on the ground that the Act was in violation of the Commerce Clause and Due Process and Equal Protection provisions of the Fourteenth Amendment of the Constitution of the United States. The Arkansas court held that the General Assembly of the State may pass laws as police regulations and may specify specific acts of care to be observed by railroads for the safety of employees and the public, and that the validity of such a statute cannot be tested by exceptional cases, "for the law makers are presumed to legislate with reference to general conditions and not to exceptional cases, and this they have the power to do." On appeal, 240 U. S. 518, 36 S. Ct. 443, 60 L. Ed. 776 (1916), the court reviewed its earlier decision in *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, supra, and affirmed the judgment of the Supreme Court of Arkansas. At page 521 of 240 U. S., the court said:

"We have recognized the impossibility of legislation being all-comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."

Both the 1907 and 1913 Acts were again attacked in *Mo. Pac. R. Co. v. Norwood*, (W. D. Ark. 1930) 42 F. 2d 765. The plaintiff contended that the statutes violated the Fourteenth Amendment and the Interstate Commerce Act, as amended by the Transportation Act of 1920. The three-judge district court sustained a motion to dismiss. In disposing of the plaintiff's claim predicated upon the Fourteenth Amendment, the court stated:

"Defendants' claim as to this is advanced in the motion to dismiss and is that the validity of these two statutes has been sustained. That position is well taken."

The court at page 767 then referred to the decisions heretofore mentioned as authority for the court's conclusion that the statutes were constitutional. The court also held, quoting from *Chicago R. I. & Pac. R. Co. v. Arkansas*, *supra*, that the Congress in its discretion may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce, but that the Congress had not done so. The motion to dismiss was sustained and the plaintiff's complaint dismissed. The case was appealed to the Supreme Court, which on April 13, 1931, affirmed the judgment of the district court, 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed 1010, and held that the complaint failed to allege facts sufficient to distinguish the case from the others in which the court had sustained the same statutes. The court further held that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews. The plaintiff filed its motion to modify the mandate so as to permit filing of an amended petition. The mandate was modified to an affirmance "without prejudice to any application to the district court to amend the pleadings or otherwise," 283 U. S. 809, 51 S. Ct. 652, 75 L. Ed. 1428. Subsequently the plaintiff amended its petition or complaint and the claim on the amended petition or complaint went to trial before the District Court, (W. D. Ark. 1933), 13 F. Supp. 24. The three-judge district court reviewed the prior litigation and background, and held that the issues of constitutionality and invasion of the field under the Interstate Commerce Act had been settled by the Supreme Court in its prior decisions, citing 219 U. S. 453, 240 U. S. 518, 283 U. S. 249. The District Court appointed a Master, and in the order confined the evidence to two lines of inquiry, see pages 25 and 26 of 13 F. Supp. After reviewing the testimony, the court announced the following conclusions of law, page 37, 13 F. Supp.:

"I. All attacks upon the validity of the two statutes here involved, except that based upon the claimed violation of the Fourteenth Amendment, are resolved against plaintiff because the same contentions have heretofore been so adjudged by the Supreme Court. *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453, 31 S. Ct. 275, 55 L. Ed. 290; *St. Louis, I. M. & S. Ry. Co. v. Arkansas*, 240 U. S. 518, 36 S. Ct. 443, 60 L. Ed. 776; *Missouri Pac. R. Co. v. Norwood et al.*, 283 U. S. 249, 51 S. Ct. 458, 75 L. Ed 1010.

"II. The attack based upon asserted violation of the Fourteenth Amendment is founded on the claim that present conditions affecting applications of these statutes are so different from those existing when the statutes were enacted as now to make the statutes unreasonable and arbitrary and, therefore, a deprivation of property without due process of law. The findings of fact being that the laws as

"The Acts are therefore unconstitutional as applied to all plaintiffs for the reasons set out in Paragraphs 6, 7, 8 and 9."

Paragraphs 14, 15, 16, 17, 18, 19, 20 and 21 are factual allegations relative to the enactment of Public Law 88-108, August 28, 1963 (Plaintiffs' Exhibit 3).

Paragraphs 22, 23, 24 and 25 are allegations of the proceedings that followed the enactment of Public Law 88-108 and the award and opinion issued November 26, 1963, by the Arbitration Board.

In paragraph 26 the plaintiffs alleged that as a result of the award "the federal government has entered the field pertaining to regulation of manning of trains and locomotives and, by reason of the Commerce Clause and Supremacy Clause of the United States Constitution, has pre-empted the State of Arkansas' power and authority to enforce state legislation inconsistent with, and contrary to, that Award."

In paragraph 27 plaintiffs alleged:

"The enforcement of Exhibits 'A' and 'B' will frustrate, hinder and prevent the execution and operation in Arkansas of Public Law 88-108, and the Award made pursuant thereto, and would further frustrate and prevent the nationally uniform operation of federal legislation intended by the Congress to provide a uniform solution to a national problem."

In paragraph 28 the plaintiffs alleged that they have no adequate remedy at law, and that unless the court enters a judgment declaring the Acts of Arkansas void and invalid and restrains and enjoins the defendants from the enforcement of the Acts, plaintiffs will either be compelled

now applied are not clearly unreasonable and arbitrary, the court concludes that plaintiff is not deprived of its property without due process of law, and that the statutes are valid."

The case was appealed to the Supreme Court, and on December 11, 1963, the court in a per curiam opinion said:

"The court sees no reason to disagree with the determinations of fact reached by the District Court. The decree is affirmed."

Missouri Pac. R. Co. v. Norwood, 290 U. S. 600, 54 S. Ct. 227, 78 L. Ed.

to bear the heavy burden and cost of complying with these Acts or will be exposed to prosecution for violation of the laws. The prayer of the complaint was in accordance with the allegations of the complaint.

On April 13, the Chief Judge of the Eighth Circuit, Hon. Harvey M. Johnsen, designated the acting Judges "as members of a Three-Judge District Court to hear and determine said action and proceeding."

On April 29 the intervenors named in the caption hereof filed a motion for permission to intervene. On May 8 an order was entered granting such leave and allowing intervenors 60 days in which to plead. On July 6 intervenors filed a motion to dismiss the complaint "for failure to state a claim upon which relief should be granted." On July 31 intervenors filed a motion to dismiss for failure to "establish statutory jurisdiction for a Three-Judge Federal Court."

On May 11 the defendants upon their motion were allowed 60 days in which to answer or otherwise plead. The answer of defendants was filed July 10, substantially denying allegations of the complaint and specifically denying paragraphs 26 and 27. In paragraph 13 of the answer the defendants admitted that in the event plaintiffs do not comply with the Acts, they will be exposed to prosecution for violation.

Simultaneously with the filing of the motion of intervenors to dismiss for lack of jurisdiction, they also moved for an order setting consolidated oral argument on the motion to dismiss for failure to state a claim and the motion to dismiss for lack of statutory jurisdiction. On August 19 the motion for order setting consolidated argument on the motions was denied and overruled. On August 25 by separate orders the court overruled both the motions.

On September 4 the answer of intervenors was filed, in which they denied that the "Arkansas Statutes in controversy are void and unconstitutional." In paragraph 4 of their answer the intervenors alleged:

"Intervenors specifically deny each and every allegation of paragraphs 6, 7, 8, 9 and 13, together with

all assertions of law and implications of fact therein, except that Intervenor's admit the allegation in paragraph 7 that plaintiffs each operate railroads of more than 100 miles and there are other railroad companies in Arkansas with less than 100 and less than 50 miles of line and that Act 116 of 1907 applies to 12 railroads operating in Arkansas and Act 67 of 1913 applies to 8 railroads operating in Arkansas."

In paragraph 9 of the answer the intervenors alleged:

"Intervenor's specifically deny the allegations of paragraphs 26 and 27 of the complaint that the federal government has pre-empted the field of local railroad operations concerning the consist of crews through Public Law 88-108, the Special Arbitration Award, or executive branch pronouncements or actions so as to prevent the operation of the Arkansas Statutes in controversy."

On September 15 intervenors filed identical motions to require each of plaintiffs to produce certain named documents pursuant to Rule 34, Fed. R. Civ. P. On September 16 plaintiffs filed their response to the motion in which, inter alia, they stated:

"That plaintiffs will file a motion for summary judgment herein in the near future on the grounds (a) that the state laws in question are pre-empted by federal legislation and (b) that the state laws in question constitute discriminatory legislation against interstate commerce in favor of intrastate commerce in contravention of the Commerce Clause of the Constitution of the United States. The documents sought by the motions are not relevant to the issues that will be raised by the motion for summary judgment, if summary judgment is granted they will never become relevant in this litigation, and therefore the very burdensome task of producing such documents should be deferred until disposition of the motion for summary judgment."

On September 18 the court entered an order that hearing and action on the motions "be deferred until the filing

and disposition of the motion for summary judgment which plaintiffs contemplate filing, as set forth in their response, or until the further orders of the court."

The motion for summary judgment was filed October 17, and as grounds therefor the plaintiffs alleged:

"1.

"That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 are preempted by federal legislation in conflict therewith, to-wit: Public Law 88-108 and the award of Arbitration Board No. 282 pursuant thereto; the Railway Labor Act, Title 45, United States Code, Sections 151 et seq.; and the Interstate Commerce Act, Title 49, United States Code, Sec. 1 et seq., and particularly the preamble thereto (49 U. S. C., preceding Sec. 1).

"2.

"That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 constitute discriminatory legislation against interstate commerce in favor of intrastate commerce in contravention of the Commerce Clause of the Constitution of the United States.

"3.

"That Act 116 of the Acts of Arkansas of 1907 and Act 67 of the Acts of Arkansas of 1913 constitute a denial of the equal protection of the laws to plaintiffs in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

"4.

"That there is no genuine issue as to any material fact relating to the foregoing allegations."

In the second paragraph of the introductory statement of plaintiffs' brief in chief, they stated:

"The legal questions presented are whether federal law has superseded state regulation in the area of railroad crew consist, whether these state laws con-

stitute prohibited discrimination against interstate commerce, and whether they deny plaintiffs equal protection of the law. The Court's ruling on those issues, in effect, will resolve the important question of whether the plaintiff railroads are to continue to sustain a massive financial burden. It is unnecessary to calculate the precise cost of compliance with these laws in order to pass on the questions raised by the Motion. The annual cost of compliance to plaintiffs is alleged in the Complaint to exceed \$6,000,000. Intervenor's in paragraph 7(b) of their Answer alleged such cost to be 'not significantly higher' than 1% of plaintiffs' total revenues. Plaintiffs' total revenues during 1963 are indicated by Plaintiffs' Exhibit 6 to have been \$813,212,183, thus 1% would be \$8,132,122. It is sufficient for the purpose of this Motion that the cost of compliance is undisputed to be a very large sum."

The court has jurisdiction of the subject matter and the parties. *The Bordon Co. v. Liddy*, (8 Cir. 1962) 309 F. 2d 871; *Kessler v. Dept. of Public Safety of Utah*, 369 U. S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962).

The relevant facts as set forth in the affidavits and exhibits to the motion for summary judgment are not controverted, and "there is no genuine issue as to any material fact" relevant to the questions raised by the allegations in paragraph number one of the motion.

The contention of plaintiffs on the question of preemption is stated in their brief as follows:

"It is the position of plaintiffs that Public Law 88-108, The Railway Labor Act of which it became a part, and the Interstate Commerce Act constitute occupation by the Congress of the field of regulation of railroad crew consist to the exclusion of such regulation by the states."

In the first paragraph of the Message from the President of the United States to the Congress, July 22, 1963, the President stated:

"This Nation stands on the brink of a nationwide rail strike that would, in very short order, create wide-

spread economic chaos and distress. After more than 31½ years of constant but fruitless attempts to achieve a peaceful settlement between the parties through every private and public means available, this dispute has reached the point where only prompt and effective congressional action can assure that serious injury to the public will be prevented."

The entire message with the various reports and appendices were introduced as plaintiffs' Exhibit 1. It is House Document No. 142.

Briefly stated, on November 2, 1959, virtually all the Nation's railroads served upon the five railroad operating Brotherhoods (intervenors), notices pursuant to Section 6 of the Railway Labor Act, 45 U. S. C., Sec. 156, proposing changes in existing collective bargaining agreements relating to the use of firemen, the consist of train crews, and other subjects. On September 7, 1960, the Brotherhoods served joint notices pursuant to the same statute upon the railroads relating to the consist of both engine and train crews and other subjects.

The gist of the railroads' proposals with regard to crew consist was to eliminate prior agreements requiring the use of firemen and various stipulated numbers of other crew members and to restore these matters to management discretion and decision. The proposals of the Brotherhoods in this area were to establish new national rules fixing the minimum crew consist on all locomotives as an engineer and a fireman and a minimum crew of three trainmen in all freight and yard assignments. On November 1, 1960, a Presidential Railroad Commission was established to investigate the facts and make recommendations for the resolution of the dispute arising out of the notices. After extensive hearings the Commission issued its report and recommendations on February 28, 1962, which found firemen unnecessary on freight trains, and which provided for the elimination of firemen in freight service and for procedures whereby the number of brakemen and switchmen could be reduced. The report is contained in an official publication by the U. S. Government Printing Office and

was attached to the motion as plaintiffs' Exhibit 2. The Commission recommended that a new national agreement be perfected which would include the following provisions:

"1. After July 1, 1962, firemen-helpers need not be assigned to other than steam locomotives in freight and yard service, except as provided in paragraphs 4, 5, 6, and 9 below.

"2. After July 1, 1962, new firemen-helpers need not be hired to man road freight and yard diesels.

"3. Firemen-helpers and engineers shall be retired from active service in accordance with the provisions of the national retirement rules set forth in recommendation 4 of chapter 3."

The remainder of the recommendation deals with allowances in the form of protective measures for persons separated from service. (Pp. 48-49, Exhibit 2.) Chapter 6, pp. 53-64, inclusive, deals with the subject of consist of crews other than engine service. At page 56 of Exhibit 2, the Commission stated:

"It is established that those few carriers which are not subject to crew consist rules and practices have crews somewhat smaller on the average than those carriers subject to such rules and practices. This suggests, although it does not conclusively prove, that the latter are to some extent subject to excess manning requirements. More persuasive is the fact that there are varying crew consists in road service on trains operated under similar conditions, as they pass from States having no 'full crew' laws into States having such laws. This is inferential evidence that the parties themselves consider that the difference in manpower requirements is not always warranted."

Beginning on page 63 of the Exhibit, the Commission stated:

"It is obvious, of course, that the ability of the Carriers, whether acting unilaterally or otherwise, to affect changes in crew consist will be limited by appli-

cable State crew consist laws or regulations, so long as such laws, and regulations continue to exist. As noted above, more of the legislation of this kind was enacted prior to 1920. These laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that there will be difficulty in applying the rule recommended by us in States where 'full crew' laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge."

The report and recommendations of the Presidential Railroad Commission were accepted by the railroads but rejected by the Brotherhoods. Thereafter the Brotherhoods requested mediation by the National Mediation Board pursuant to Section 5 of the Railway Labor Act, 45 U. S. C., Sec. 155, and on June 26, 1962, that Board pursuant to Section 5 of the Railway Labor Act, 45 U. S. C., Sec. 155, proffered arbitration of the dispute under Sections 7 and 8 of that Act. The railroads agreed to arbitration, but the Brotherhoods rejected the proffer, whereupon the National Mediation Board terminated its services. Litigation followed. *Brotherhood of Loc. Eng. v. B. & O. R. Co.*, 372 U. S. 284, 83 S. Ct. 691, 9 L. Ed. 2d 759 (1963), in which the court at page 291 of 372 U. S., in disposing of the case, said:

"What is clear, rather, is that both parties, having exhausted all of the statutory procedures are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of Sec. 10 providing for the creation of an Emergency Board."

Section 10 of the Railway Labor Act, as amended, 45 U. S. C. 160, provides that if a dispute between a carrier and its employees is not settled under other provisions of the Act and such dispute should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute.

The President created such an emergency board which submitted its report and recommendations on May 13, 1963, which were accepted by the railroads and rejected by the Brotherhoods as a basis for settling the national labor dispute. Other efforts were made by the President but with no avail, and ultimately the President sent the Message, hereinbefore referred to, (Exhibit 1), to the Congress recommending legislation to impose a settlement on the parties and avoid a threatened national railway strike.

Upon receipt of the Message the Congress acted quickly and efficiently. Public Law 88-108 was enacted August 28, 1963, 77 Stat. 132, 45 U. S. C. Sec. 157 (1964 Supp.). Section 2 of the Act provided for the creation of an Arbitration Board, which was directed to decide the questions raised in the notices served by the railroads and Brotherhoods relating to the use of firemen and train consist crews and to make an award. Section 3 of the Act, inter alia provides:

"The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, *shall resolve the matters on which the parties were not in agreement*, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration." (Emphasis added.)

Section 4 of the Act provided that the arbitration was to be conducted pursuant to the arbitration provisions of

the Railway Labor Act to the extent that such was feasible, and "the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed * * *." The Arbitration Board, pursuant to the provisions of the statute, after extensive hearings and proceedings, issued its award on November 26, 1963. The award provided that subject to certain protective provisions for employees, 90 percent of the firemen positions (excluding passenger service) on railroads were to be abolished. This was predicated upon the Board's finding that such employees were unnecessary to the safe and efficient operation of freight and yard Diesel locomotives. The full findings of the Arbitration Board on this issue appear in full in subsection 7, pp. 27-28, of the opinion of the neutral members (Plaintiffs' Exhibit 4). As to the crew consist issue, the Board found that the consist of freight and yard crews had " * * * been determined generally by local rules, practices, state full crew laws, or regulations issued by public utility commissions." At page 45 of the opinion of the neutral members (Plaintiffs' Exhibit 4), the following statement appears:

"It has been explained earlier in this opinion that the size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

The award provided a binding arbitration procedure whereby the number of crew members to be used in road, freight and yard crews was to be fixed on a local basis. (See pp. 14-19 of the Award, Plaintiffs' Exhibit 4.) The special boards of adjustment authorized in the Award to fix the size of such crews have convened and discharged that mandate on each of the plaintiff railroads, with the result that many switch crews have been fixed at less than three helpers and many freight crews have been fixed at less than three brakemen.

The awards of the special boards of adjustment under and by virtue of the provisions of the Act to fix train and yard crew consists on the Missouri Pacific Railroad and the Texas and Pacific Railroad appear in Exhibit 5. The award respecting the northern, central and southern districts of Missouri Pacific Railroad Company is of utmost importance in this litigation since it covers the vast majority of the operation of the railroad in Arkansas. The award is as follows:

- "1. (a) All main line local freight trains will be operated with a minimum of two brakemen.
 - (b) All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c) The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
 - (d) The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.
- "2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helper shall be required on the following yard assignments:

Leavenworth Yard
 Falls City Yard
 Fort Scott Yard
 Paragould Yard."

As provided by the Act, the Award of Arbitration Board No. 282 was filed in the United States District Court for the District of Columbia, and the Brotherhoods filed petitions in that court for its impeachment. Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co., and Brotherhood of Locomotive Engineers v. Union Pac. R., (D. C. 1964) 221 F. Supp. 11. Those two actions were brought to impeach and set aside an award of the special arbitration board created under the Act in order to avoid a threatened nationwide railroad strike which was then imminent. Judge Holtzoff, after thorough consideration of the contentions of the Brotherhoods, said at page 21:

"In view of the foregoing considerations, the court reaches the conclusion that the award is valid. It is within the statutory authority of the board and is not subject to any infirmity. There remains for consideration the challenge to the constitutionality of the statute under which the board acted."

The court then discussed the question of the constitutionality of the Act, Public Law 88-108, and at page 23 said:

"The conclusion is inescapable that the standards as defined in the enabling Act are sufficiently adequate and definite. The statute is not vulnerable to any attack on the ground of unlawful delegation of power without proper standards. The statute is clearly constitutional as being within the power of the Congress. * * *

"In the light of the foregoing discussion, the award made by the arbitration board is valid; the Congress had power to order the arbitration; and, the board acted lawfully within the orbit of the authority delegated to it."

The case was appealed, and on February 20, 1964, the United States Court of Appeals for the District of Columbia, 331 F. 2d 1020, in affirming the District Court, said at page 1022:

"We have given meticulous consideration to the parties' voluminous briefs and extensive oral argu-

ments, and have concluded that the opinion of District Judge Holtzoff is a correct and adequate disposition of the issues presented. On the basis of his opinion, D. C., 225 F. Supp. 11 (1964), we affirm his judgment."

Certiorari was denied by the Supreme Court April 27, 1964, 337 U. S. 918, 84 S. Ct. 1181, 12 L. Ed. 2d 187.

Prior to the decision in 225 F. Supp. 11, above referred to, the Brotherhoods applied for a temporary order to restrain the arbitration board from making any award that would name or affect the employees of a certain railroad. Division 700, Bro. of Loc. Eng. v. National Railway Labor Arbitration Board, (D. C. 1963) 223 F. Supp. 377. At page 376 Judge Holtzoff said:

"As was pointed out by counsel, the legislation here involved is somewhat unusual. No constitutional question, however, as to the validity of the legislation is being raised. * * * It is reasonable to assume, without deciding, that the Congress was invoking its power over interstate commerce and specifically over public utilities engaged in interstate commerce. Just as it has assumed power to regulate rates, through regulatory commissions, so it is now assuming power in this case to regulate working conditions, wages and similar matters through an Arbitration Board. An emergency may not create power, but it may give rise to an occasion to exercise a power that has been dormant or latent."

The application for a temporary restraining order was denied.

The case of *In Re Certain Carriers*, (D. C. 1964) 229 F. Supp. 259, was a suit by certain railroad companies for an injunction to implement an award made by the Special Arbitration Board created by Congress to determine certain major questions in dispute between the railroad companies and the organizations of their employees. Specifically the railroad companies applied for a permanent injunction to restrain the representatives of the organizations of employees from calling, instigating or encouraging a strike or other stoppages in protest against applications

of the award or any part of the award. The court set forth a brief history of the creation of the Arbitration Board, and at page 260 said:

"The award is final and binding on both sides and must be obeyed by all parties. Since the arbitration was conducted under the aegis of Congress, the award becomes part of the law of the land. It appears from the papers submitted in support of the present application that certain leaders of employees' organizations have made statements that are susceptible of a construction that they were threatening to call a strike and hence came this application."

Again, on page 261 of the opinion the court said:

"It has been said very often that this is the first time in the history of labor relations in this country that compulsory arbitration has been directed by the Congress. This is erroneous. True, this is the first time that such a course has been pursued on a nationwide scale, but compulsory arbitration has been in effect for years in labor relations of railroads in connection with minor disputes as they are called, that are being handled by the adjustment boards."

The court granted an injunction against calling any strikes as prayed by the moving parties.

This court has heretofore held that there is no genuine issue as to any material fact relevant to the questions raised by the allegations in paragraph 1 of the motion for summary judgment. However, the court is of the opinion that allegations numbers 2 and 3 of the motion are based upon controverted facts. Therefore, the questions which the court is entitled to consider are contained in paragraph 1 of the motion.

In *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, (1824), the great Chief Justice Marshall, in construing the Commerce Clause of the Constitution, Art. 1, Sec. 8, Clause 3, "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" at page 195 said:

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

In *Missouri Pac. R. Co. v. Porter*, 168 Ark. 22, 269 S. W. 47 (1925), the appellees brought a suit against the railroad to recover the value of 75 bales of cotton which were to be shipped from Earle, Arkansas, to Liverpool, England, on an export bill of lading. The cotton was destroyed by fire while on the cars of the railroad before its train left Earle, Arkansas. The railroad company interposed as a defense the provision in the bill of lading providing that "no carrier or party in possession of said property shall be liable for any loss thereof by causes beyond its control, or by floods, or by fire, or by riots, strikes, or stoppage of labor." The Supreme Court of Arkansas held that the provision in the bill of lading exempting the carrier from liability was void. The case went to the Supreme Court of the United States by writ of error, 273 U. S. 341, 47 S. Ct. 333, 71 L. Ed. 672 (1927), and in disposing of the question, the court at page 345 of 273 U. S. said:

"The general regulation of the 'issuance, form, and substance' of bills of lading is broad enough to cover contractual provisions, like the one involved in this case, exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down

and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." (Citing cases.)

In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945), the principal contention of the railroad was that the state statute contravened the Commerce Clause of the federal Constitution. Arizona had enacted what was commonly referred to as the Arizona Train Limit Law of May 16, 1912. Arizona Code Ann., 1939, Sec. 69-119, which made it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger or seventy freight cars. The court, in reversing the Supreme Court of Arizona, said at page 783 of 325 U. S.:

"Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail."

In the consideration of the case, the court at page 769 of 325 U. S. said:

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible (citing cases), or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. (Citing cases.)"

In *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 31 S. Ct. 829, 58 L. Ed. 1312 (1914), the court at page 292 of 234 said:

"If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—

if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway.”

In *Savage v. Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182 (1912), the court at page 524 of 224 U. S. said:

“The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce.” (Citing cases.)

No doubt Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate trains and establish, through proper agencies, such regulations as are necessary and proper for the protection of those engaged in interstate commerce. *Chicago, R. I. & P. R. v. Arkansas*, 219 U. S. 453, 31 S. Ct. 275, 55 L. Ed. 290 (1911).

Federal legislation supersedes state law which, by its terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy. *McDermott v. Wisconsin*, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754 (1913); *Florida Lime & Avocado Growers v. Paul*, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Mine Workers v. Arkansas Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559, 100 L. Ed. 941 (1956).

In *Cloverleaf Co. v. Patterson*, 315 U. S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942), the court, beginning at page 154 of 315 U. S., said:

"This power of Congress to exercise exclusive control over operations in interstate commerce is not in dispute here. Nor is this power limited to situations where national uniformity is so essential that, lacking Congressional permission, all state action is inadmissible notwithstanding a complete absence of federal legislation. Exclusive federal regulations may arise, also, from the exercise of the power of Congress over interstate commerce where, in the absence of Congressional action, the states may themselves legislate. It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson v. Black-bird Creek Marsh Co.*, 2 Pet. 245; *California v. Thompson*, 313 U. S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.

"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Pennsylvania v. Nelson*, 350 U. S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), the court at page 501 of 350 U. S. said:

"Where, as in the instant case, Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate, different criteria have furnished touchstones for decision. Thus,

'(t)his Court, in considering the validity of state laws in the light of * * * federal laws touching the

same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.' *Hines v. Davidowitz*, 312

U. S. 52, 67."

Following the above quotation, the court referred to the case of *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 213, 230-231, and then proceeded, beginning on page 502, to apply several tests to the question of supersession. In the syllabus the tests applied are stated as follows:

"The Smith Act, as amended, 18 U.S.C. Sec. 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. Pp. 498-510.

"1. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the States to supplement it, Pp. 502-504.

"2. The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. Pp. 504-505.

"3. Enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Pp. 505-510."

In *Terminal R. Asso. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 63 S. Ct. 420, 87 L. Ed. 571 (1943), the Railway Labor Act was held not to have preempted the field of regulating work conditions by state legislation. The court stated that the state police power could demand that railroads in Illinois provide cabooses upon all runs within the state for the health, safety and comfort of the switchmen employees of the interstate railroads operat-

ing within Illinois. This opinion carefully considers the various interests involved, including the orderly administration of the Railway Labor Act and the possible burden upon interstate commerce and the state's legitimate interest in providing and protecting the health, safety and welfare of its citizens. This opinion at page 6 makes the following statement with respect to the Railway Labor Act as it existed January 18, 1943: "The Railway Labor Act like the National Labor Relations Act does not undertake government regulation of wages, hours or working conditions." This case and cases subsequently, construing the Railway Labor Act, are in agreement, however, that Congress has the power to preempt and occupy the field with respect to wages, hours and working conditions or any other facet of this industry which operates in interstate commerce as heretofore set out in *Southern Pacific v. Arizona*, supra, and *Missouri Pacific v. Porter*, supra.

It is readily apparent from *Southern Pacific v. Arizona*, supra; *Atlantic Coast Line v. Georgia*, supra; *Florida Lime & Avocado Growers v. Paul*, supra; and *Cloverleaf Co. v. Patternson*, supra; that the principal test in determining whether or not a state statute is pre-empted by federal legislation or superseded by it is the actual or potential conflict. In the absence of a stated congressional intent in the federal act to specifically pre-empt state legislation, the question that must be determined is the extent of the conflict and whether the enforcement of the state law would substantially interfere with the regulations and rules promulgated under federal law. The *Pennsylvania v. Nelson* case, supra, in the portion of the court's opinion quoted above designates this conflict principle by the terms "occupying the field," "repugnance," "difference," "irreconcilability," "inconsistency," and "interference." Although no particular constitutional yardstick provides the answer in every fact situation, the overriding consideration is always the same. A conflict of policy is as much an actual conflict as is conflicting provisions in the statutes themselves. This principle and the basis of it are elaborately discussed in *California v. Taylor*, 353 U. S. 553, 177 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957), where the question was "whether the Railway Labor Act of May 20, 1926, 44 Stat.

577, as amended, 45 U. S. C. Sec. 151 et seq., applies to the State Belt Railroad, a common carrier owned and operated by the State of California and engaged in interstate commerce. For the reasons hereafter stated we hold that it does."

On September 1, 1962, The Board of State Harbor Commissioners entered into a collective bargaining agreement with the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen as representatives of the Belt Railroads's operating employees. The agreement established procedures for promotions, layoffs and dismissals. It also fixed rates of pay and overtime. Those procedures and rates differed from their counterparts under the state civil service laws. The collective bargaining agreement conformed to the Railway Labor Act and was observed by the parties until January 1948. A successor to the Harbor Board instituted litigation in the state courts of California, in which it contended that the Railway Labor Act had no application to the Belt Railroad, and that the wages and working conditions of the Railroad's employees were governed by the State's civil service laws rather than by the agreement. The Supreme Court of California agreed with the contention of the Harbor Board. Following this litigation, certain employees of the Belt Railroad commenced litigation in the Northern District of Illinois against ten members of the National Railroad Adjustment Board, First Division, and its executive secretary. The District Court dismissed the complaint, but on appeal the Court of Appeals of the Seventh Circuit, 233 F. 2d 251 (1956), reversed the trial court. Certiorari was granted to resolve the conflict between the United States Court of Appeals and the California Supreme Court as to the applicability of the Railway Labor Act to a railroad owned and operated by a state.

On page 559 of 353 U. S., the court said:

"On numerous occasions, this Court has recognized that the Railway Labor Act protects and promotes collective bargaining." (Citing cases.)

On page 561 the court said:

"Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally pro-

ted right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws. In *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, 232, involving Sec. 2, Eleventh, of the Railway Labor Act, which permits the negotiation of union-shop agreements notwithstanding any law of any State, we stated that: 'A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State.' "

The State of California contended that doubts were created as to the congressional intent to make the Railway Labor Act applicable to state-owned railroads because in certain other federal statutes governing employer-employee relationships, Congress has expressly exempted employees of the United States or of a State. In reply to that contention the court at page 564 stated:

"We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees."

At page 566 the court further stated:

"The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclusion that Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State. The principal unions in the railroad industry are national in scope, and their officials are intimately acquainted with the problems, traditions and conditions of the railroad industry. Bargaining collectively with these officials has often taken on a national flavor, and agreements are uniformly negotiated for an entire railroad system. 'Breakdowns in

collective bargaining will typically affect a region or the entire nation.' Lecht, *Experience under Railway Labor Legislation* (1955), 4. It is by no means unreasonable to assume that Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force."

When Congress does not expressly state that it intends to strike down particular state statutes, or does not manifest an overt intention to pre-empt state legislation, the constitutional question can be resolved only by an examination of the possibility of actual or apparent conflict in the implementation of the federal legislation. This principle is stated in *Southern Pacific Co. v. Arizona*, *supra*, at page 766 of 325 U. S., as follows:

"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect health and safety of the public unless its purpose to do so is clearly manifested, citing cases, or unless the state law, in terms of its practical administration, conflicts with the act of Congress, or plainly and palpably infringes its policy. Citing cases."

Upon the initial examination of a federal and state statute which are alleged to be in conflict and it is determined that the federal statute expressly manifests the congressional intent to pre-empt or occupy the field, the question, of course, is resolved at that point. When the federal statute is silent, it cannot be said that the failure of Congress to state that it intends to pre-empt or occupy the field is conclusive that such intent does not exist. It seems almost axiomatic that Congress cannot anticipate all potential conflicts between the implementation of its policy

as manifested by its legislation and that of the state and its policies manifested and implemented through its legislation. As a practical matter the only manner in which it can be determined whether or not federal legislation is in actual or apparent conflict with state legislation and thus, under the Supremacy Clause, occupying the field, is by actual examination of the subject matter and application to a particular set of facts. A classic example of this actual conflict between state and federal legislation when no manifested intent of Congress was present that the state law be pre-empted or the field occupied is presented in *Teamsters Union v. Oliver*, 358 U. S. 283, 79 S. Ct. 321, 3 L. Ed. 2d 312 (1959), where the court stated the question as follows:

"We must decide whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied. * * * To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, * * *. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. Florida*, 325 U. S. 538, 542-544. Cf. *International Union v. O'Brien*, 339 U. S. 454, 457; *Amalgamated Assn. v. Wisconsin Employment Relations Board*, 340 U. S. 383; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U. S. 953. The solution worked out by the

parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. *Algona Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301, 307-312. Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept. v. Hanson*, 351 U. S. 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. " * * * Congress has sufficiently expressed its purpose to * * * exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade." *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 481. We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley

Acts, it is for Congress, not the States, to provide it." The court reversed the Supreme Court of Ohio and the Court of Appeals of Ohio, Ninth Judicial District, 167 Ohio 299, 147 N. E. 2d 856, and held that the state antitrust law may not be applied to prevent contracting parties from carrying out their agreement upon a subject matter as to which the federal law directs them to bargain.

The case reached the Supreme Court again in 1960, 362 U. S. 605. Upon remand, the Court of Appeals of the State of Ohio, Ninth Judicial District, "set aside its previous order 'as it concerns and applies to Revel Oliver, appellee, as a lessor-driver' but continued the order in full force and effect 'as it concerns and applies to Revel Oliver, appellee, as a lessor-owner and employer of drivers of his equipment.'" The court in its per curiam opinion again

stated that Ohio's antitrust law may not "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." The judgment was accordingly reversed.

It was not necessary in the *Teamster Union v. Oliver* case, *supra*, to hold that Congress by the enactment of federal statutes had occupied the field or pre-empted the Ohio statute because an examination of the statutes and their application to the particular facts reflected a clear, actual conflict between the implementation of the federal statutes and the enforcement of the state statute.

In the instant action, although the enabling legislation itself might be said to contain no language which manifests a congressional intent that the proposed Arbitration Board and the award made pursuant to the authority and direction of the statute pre-empted or occupied the field, the fundamental consideration is its implementation and its practical application in actual factual situations. As heretofore stated and emphasized in the quoted portions from the various Supreme Court opinions construing the Railway Labor Act, the question presented in the instant action is not resolved by a mere comparison of Public Law 88-108 and the state statutes, but by an examination of their practical application and the actual and apparent conflict because of the identity of subject matter which is dealt with by the state full-crew laws and this particular statute which became a part of Section 157 of the Railway Labor Act. 45 U. S. C. Sec. 157 (1965 Supp.).

The intervenors and defendants contend that the Act, Public Law 88-108, and the proceedings of Arbitration Board 282 reveal that the Congress did not intend to pre-empt the state full-crew statutes and that the Act is "temporary emergency legislation." Since these two contentions are closely related, they should be considered together.

In their brief the intervenors stated:

"Public Law 88-108 is, by its terms, temporary emergency legislation. Section 8 of the law specifically provides that the 'joint resolution shall expire one

hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.' The last sentence of Section 4 permits the award of the board to remain in effect 'not to exceed two years from the date the award takes effect * * *.' The Board has declared that its Award will terminate as of January 25, 1966, and with the termination there will be nothing left of it, the Board nor Public Law 88-108. The parties will then be free to resolve the Firemen and Crew Consist issues either through collective bargaining or unilateral action in other states—but in Arkansas they will still be under the operation of the Arkansas Full Crew Laws. Their private agreements in the form of regional awards from Special Boards of Adjustment will similarly expire. It is inconceivable that Congress intended that permanent state legislation of long-standing would be stricken by these temporary, private contractual restrictions on the parties."

The defendants on their brief stated:

"The total concept of police power was founded as an essential ingredient to our federated system of government involving the several sovereign states. The proposition that a state can best diagnose and prescribe the cure of an evil has not yet been successfully assailed.

"The two year limitation of action is evidence of the fact that Public Law 88-108 was not to pre-empt this field of police power. The comments of plaintiffs on this matter deserve consideration. It is difficult to confirm a true legal basis for plaintiffs' argument particularly in view of the proposition that if the full crew laws were pre-empted, they would be revived at the conclusion of the life of the pre-empting authority. 1 Sutherland Statutory Construction, Sec. 2027.

"The power to enact laws under the police power is an important sovereign attribute. This extensive authority is vested in the General Assembly. It is vital machinery to the State. It should not be removed on

such anemic evidence and in such a perfunctory manner."

The court has heretofore set forth that part of Section 3 of the Act which outlines the work that the Arbitration Board created by the Act shall perform, and directs that Board to dispose of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews," and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist," and implementing proposals pertaining thereto. The last sentence of the section provides:

"Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration."

The "Whereas" provisions of the Act, inter alia, provide:

"Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

"Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute;

"Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

"Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

"Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such

negotiations tentative agreement was reached with respect to portions of such suggestions; and

"Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement;"

In the Message of the President to the Congress, House Document 142, the President outlined some of the proceedings that had been taken in an effort to avoid the necessity of enacting Public Law 88-108. He said:

"Ineffective measures which would not halt an injurious nationwide rail strike have been rejected as inconsistent with the public interest.

"Punitive antilabor measures which would destroy railway labor's rights to collective bargaining and reasonable job security have been rejected as harmful to the Nation and insensitive to the very real issues posed by the proposed work rule changes.

"Seizure of the railroads has been rejected as unjustified in the circumstances of this case, as creating complex legal and financial problems for the Government, and as merely postponing the day of reckoning on more efficient work rules and their acceptance by the brotherhoods.

"Compulsory arbitration of this dispute by a special or congressional panel has been rejected as inconsistent with the principle that solutions reached through free collective bargaining should always be permitted and preferred.

"Indefinite extension of the status quo for one or both parties has been rejected as an evasion of a serious public as well as labor-management issue that must be squarely faced.

"Our objective instead was to find a solution which—

"(1) Is sufficiently familiar to the Congress, in terms of the procedures and principles involved, to facilitate its prompt enactment;

"(2) Encourages the parties to achieve their own solutions through collective bargaining;

"(3) Confronts the parties, on issues where voluntary agreement is not possible, with methods and standards of solution which are comparable to those both sides have previously experienced and found acceptable;

"(4) Recognizes both the public interest in promoting railroad efficiency and preventing a disastrous strike and the public's concern for those adversely affected by a settlement; and

"(5) Provides for an interim remedy while awaiting the results of further bargaining by the parties."

In support of their contentions that the Congress did not intend to pre-empt the state full-crew statutes by the enactment of Public Law 88-108, the intervenors and defendants refer to portions of the hearings before the House Committee and also before the Senate Committee and some of the statements made on the floor of the House of Representatives and of the Senate while the bill was under consideration. During the hearings on the bill before both the House and Senate Committees, its possible effect on state crew consist laws was discussed, but the question under discussion was primarily with reference to a joint resolution that was submitted by the President, which assigned to the Interstate Commerce Commission essentially the same responsibility that was delegated to the arbitration board that was ultimately enacted as Public Law 88-108. Both branches of the Congress clearly understood that the bill did not contain a provision which would prevent pre-emption of the state crew consist laws, and in fact when the question was under consideration, it was suggested that if they did not intend to pre-empt the state crew consist laws that an expression of intent to preserve such state law should be included in the bill. A complete review of the legislative history will reveal that some members of Con-

gress thought that the legislation would pre-empt state crew consist laws, and others thought it would not. It is perfectly clear that the Committees in both Houses had it brought effectively to their attention that the legislation might have a pre-empting effect, and if such pre-emption was not the desire and intention of the Congress, it should so expressly state in the bill. There was no such expression although the bill was amended in many other respects after the hearing before both Committees had been concluded.

If any rational conclusion can be drawn from a legislative history on the question as to whether it intended to pre-empt the state full crew consist laws, it is that the Congress intentionally elected not to include a saving provision for such laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis. There is nothing in the Act itself or in the history that indicates that the Congress intended to resolve this problem of national magnitude by legislation that would be effective in only some 30 states that do not regulate crew consists by law or administrative regulation. It is a generally accepted principle of statutory construction that Congress normally intends that federal law shall operate uniformly throughout the Nation in order that the federal program will remain unimpaired. In *Jerome v. United States*, 318 U. S. 101, 63 S. Ct. 483, 87 L. Ed. 640 (1943), the court at page 104 of 318 U. S. said:

"But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States v. Pelzer*, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control.

The language of the Act, Public Law 88-108, and of the Award is plain and unambiguous, and courts should not resort to legislative history when the language of the statute is clear. In *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944, 93 L. Ed. 1207 (1949), the court at page 61 of 337 U. S. said:

"Third. Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of

Sec. 1404(a) but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 324 U. S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

In *Packard Co. v. Labor Board*, 330 U. S. 485, 67 S. Ct. 789, 91 L. Ed. 1040 (1947), the court at page 492 of 330 U. S. said:

"We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

As heretofore stated, the issue of pre-emption by Public Law 88-108 and the award made thereunder cannot be resolved by simply comparing the provisions of the act itself and the state statutes in question. The identity of the subject matter itself demonstrates apparent conflict.⁵

⁵ The Arbitration Board instructed the Special Boards of Adjustment to use the following guidelines in reaching their decisions:

"C(1). The special board of adjustment in making its decision shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

"C(2). General Considerations.

- (a) Assurance of adequate safety.
- (b) Avoidance of unreasonable burden or workload on members of the crew.
- (c) Changes in operating conditions, including density of traffic.
- (d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
- (e) Special conditions which exist on any particular assignment.
- (f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
- (g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

Added to this is the actual conflict presented by the application and implementation of the state and federal statutes which attempt to govern the same conduct. Actual conflict is demonstrated by the very fact that none of the parties

- (h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
- (i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings of intersections.
- (j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
- (k) The presence or absence of a fireman in the engine service crew."

In addition, the Act itself in Section 3 specifically recites the substantive matters to be considered by the Arbitration Board, which substantially is the same thing regulated by the state full crew laws:

"The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' * * *."

The award of the Board of Adjustment for the northern, central and southern districts of the Missouri Pacific Railroad Company has heretofore been set forth, and it can readily be seen that provision 1(a) is concerned with exactly the same subject matter as the state full crew law which also prescribes the number of brakemen. Section 1(b) deals with the same identical subject matter as the state full crew law which regulates the number of brakemen. Section 2 deals with the same identical subject matter as regulated by the state full crew law which attempts to establish the crew consist.

The local Adjustment Award for the Gulf District of Missouri Pacific Railroad provides at pages 8 and 9:

- "1. (a) All main line local freight trains will be operated with a minimum of two brakemen.
- (b) All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
- (c) The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
- (d) The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.

"2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service."

It is apparent that provisions 1(a), 1(b) and (2) deal with exactly the identical subject matter which is regulated by the state full crew law. The local Adjustment Award for the Texas and Pacific Railroad Company contains identical provisions to the awards for the Missouri Pacific quoted above.

can comply with both the state law and the Arbitration Award. This fact in itself demonstrates that there is no merit whatever to the argument that Congress has not occupied the field with respect to the fireman issue and the crew consist issue. The *Southern Pacific v. Arizona* case, *supra*; *California v. Taylor* case, *supra*; and *Teamsters Union v. Oliver* case, *supra*, establish that the overriding consideration in determining whether or not a particular provision under the Railway Labor Act, or any other federal legislation, may be said to occupy the field or to preempt the state legislation is the actual conflict arising in administering and implementing the congressional policy as reflected by the federal statute. In these three cases it can readily be seen that actual conflict exists by virtue of the inability of the parties to comply with both the state and federal acts. The various constitutional tests used to determine whether or not congressional legislation can be said to pre-empt or occupy the field when no manifested intent to do such is contained in the statutes themselves are determined by the actual conflict between the state and federal acts. These various constitutional guidelines do no more than state that under the Supremacy Clause that when a conflict (either in wording of the statutes or in their application) exists between a state and federal act, the state act must yield to the federal act by virtue of the Supremacy Clause. This same rationale, when applied to the commerce provisions of the Constitution is often expressed in terms of burden upon or affecting interstate commerce. Again, the overriding consideration in applying that constitutional test is conflict between the state and federal acts, or the implementation of the federal act and its frustration by virtue of the state act. Conflict is not limited to an examination of the provisions of the statutes themselves. In a primary sense that is where the examination to determine the actual or possible conflict begins. But this initial determination is no more than the first step in determining if the conflict exists. It has been demonstrated in the instant case that under the particular facts the parties cannot comply with the award made thereunder. It was stated in *In Re Certain Carriers*, *supra*, that where the proceeding under which the award was made "was con-

ducted under the aegis of Congress, the award becomes part of the law of the land."

In *Florida Lime & Avocado Growers v. Paul*, *supra*, the court at page 142 of 373 U. S. stated:

"A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." (Citing cases.)

The Arbitration Board created by the Act was specifically directed "to resolve the matters on which the parties are not in agreement." This is precisely what the Board did. It was not intended that the Board of Arbitration created by the Act should continue in existence as a permanent arbitration board.

Sections 6 and 7 of the Act provide:

"Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement."

"Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

Section III of the General Award, entitled "Consist of Road and Yard Crews (Other Than Engine Service)", provided that the issue of crew consists shall be remanded to

the local properties for negotiation. Beginning on page 15 of Exhibit 4, the review procedures were set forth, which provided:

"B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment."

Then follows provisions relative to the election of the members of the special boards of adjustment. On page 16 of Exhibit 4 the board said:

"B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement."

The guidelines referred to appear on pages 17-19, inclusive, of Exhibit A, a portion of which is set forth in footnote 5.

The award of Arbitration Board 282 provided that changes in the scope or application of rules which required a stipulated number of trainmen in road service or brakemen in yard service can only be accomplished by agreement or in accordance with procedures provided therein. The court has heretofore referred to and set forth the award made by Arbitration Board 282 and by the special board of adjustment established under Arbitration Board 282 dated May 6, 1964. Plaintiffs' Exhibit 5 contains the proceedings and award made by the special board of adjustment established under Arbitration Board 282 between the Missouri Pacific Railroad (Northern, Central and Southern Districts) and also the Gulf District of the Missouri Pacific, and the Texas & Pacific Railroad and

subsidiary lines with the Brotherhood of Railroad Trainmen.

When the uncontroverted facts as reflected by the record before the court are considered, the court is convinced that the purpose and intent of Congress in enacting Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the awards, which would occur on May 6, 1966. Section 4 of the Act provides that the award shall continue in force not to exceed two years from the date the award takes effect unless the parties agree otherwise. Without doubt, it was contemplated and provided that any changes made thereafter in crew consists would be governed by collective bargaining conducted pursuant to the procedure prescribed by the Railway Labor Act. That Act protects and promotes collective bargaining, *California v. Taylor*, supra, and supersedes state laws that restricted the collective bargaining rights that were granted and recognized by the Railway Labor Act. In the light of the decisions previously discussed herein setting forth the area of regulation denied the states and vested in the bargaining parties, Congress by the enactment of Public Law 88-108, intended to protect collective bargaining, but when the parties were unable to resolve their dispute by collective bargaining, there was little doubt in the mind of Congress that the number of employees to be assigned to a task, fundamental as that question is in the matter of working conditions, is an issue that should be resolved by arbitration under and in accordance with the provisions of the Railway Labor Act.

Not the least of the court's consideration is the substantial public interest involved relative to the uninterrupted and orderly flow of goods in interstate commerce as well as the necessity for an efficient and orderly railway transportation system as a part of the national defense effort. (See Letter Advisory Opinion from General Counsel of the Department of Defense Joint Resolution Committee, U. S. Code Cong. and Adm. News, 1963, p. 842, which states that any interruption in rail service would severely impair the defense effort.)

The essential nature of the orderly flow of rail transportation for goods and services is succinctly stated in

Virginia Ry. v. Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1936), in which the court at page 553 of 300 U. S. stated:

"The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. *Wilson v. New* 243 U. S. 332, 347-348. The Railway Labor Act, Sec. 2, declares that its purposes, among others, are 'To avoid any interruption to commerce or to the operation of any carrier engaged therein,' and 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.' The provisions of the Act and its history, to which reference has been made, establish that such are its purposes, and that the latter is in aid of the former. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here."

This opinion, in recognizing the substantial national interest involved in the settlement of railway disputes, made the following statement which seems particularly applicable in the instant controversy at page 552 of 300 U. S.:

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us,

the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

It would unduly extend this opinion to discuss the multiple conflicts between the crew consist laws of Arkansas and the unambiguous national policy evidenced by Public Law 88-108 and the Railway Labor Board, which protects collective bargaining to the exclusion of state regulation or state crew consist laws in direct conflict with the federal legislation and expressed policy. The attacked statutes constitute an obstacle to the accomplishment of the federal aims and purposes and frustrates the national scheme of regulation, and must be deemed superseded by the federal legislation.

The actual conflict that exists, as heretofore stated, is apparent by virtue of the inability of the parties to comply with both the state statutes and the federal act and the arbitration award made pursuant thereto. This actual conflict, together with the Supremacy Clause of the federal Constitution, thus renders the state statutes unenforceable whether the federal legislation be said to pre-empt or occupy the field.

The arbitration was conducted, as required by Section 4 of Public Law 88-108, pursuant to Sections 7 and 8 of the Railway Labor Act. In *Int'l Asso. of Machinists v. Central Airlines*, 372 U. S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963), at page 687 of 372 U. S. the court said:

"Congress has long concerned itself with minimizing interruptions in the Nation's transportation services by strikes and labor disputes and has made successive attempts to establish effective machinery to resolve disputes not only as to wages, hours and working conditions, the so-called major disputes connected with a negotiation of contracts or alterations in them, but also as to interpretation and application of existing contracts, the minor disputes of the type involved in this case."

The Supreme Court has many times reviewed the history of the railway labor laws.*

In *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), the court, in speaking of the so-called minor disputes, at page 727 of 325 U. S. said:

"The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them. Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation. Sec. 3 First (i). Rights of notice, hearing, and participation or representation are given. Sec. 3 First (j). In some instances judicial review and enforcement of awards are expressly provided or are contemplated. Sec. 3 First (p); cf. Sec. 3 First (m). When this is not done, the Act purports to make the Board's decisions 'final and binding.' Sec. 3 First (m)."

In Section 3 of Public Law 88-108 it is provided that the award made by the Arbitration Board "shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration."

Act 116 of 1907 boldly provides that no railroad company operating any line or lines of railroad in this state and engaged in the transportation of freight over its lines "shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes * * *."

* *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945); *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950); *Brotherhood of Trainmen v. Chicago, R. & I. R. Co.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957); *Union Pacific R. Co. v. Price*, 360 U. S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959); *Int'l Asso. of Machinists v. Street*, 367 U. S. 740, 81 S. Ct. 1784, 6 L. Ed. 1141 (1961).

The President in his Message, Plaintiffs' Exhibit 1, at page 9 stated:

"The Presidential Commission was established in part, it said, because of the need to close the gap between technology and work."

In the concluding paragraph on page 10 the President said:

"Thus the prompt enactment of this measure by the Congress will help launch a new national effort to meet the growing challenge of worker displacement by technological and economic change. Both the proposed bill and the new Commission are actions that will benefit both labor and management—but above all, they will benefit the public interest, and that is our primary test."

It must be borne in mind that in the award of Arbitration Board 282 the special boards of adjustment were specifically directed to follow certain guidelines in the consideration and resolution of questions submitted to them. The boards were required, in making the awards, to consider the safety of the employees, the work load, changes in operating conditions, and all other local factors in order that the problems might be resolved as nearly as possible on a uniform national basis.

The Congress was confronted with the broader aspects of the problem and we cannot believe that the Congress intended a hiatus in the procedure provided by Public Law 88-108 and the Railway Labor Act. The Congress intended to provide a means for the settlement of major disputes in the same manner that it had provided for the settlement of minor disputes and to enact a statutory scheme to be legally enforceable in the courts for the resolution of all work rules disputes arising from the operation of trains in interstate commerce whether heretofore classified as major or minor. The court does not understand that the intervenors and defendants are contending that the Arbitration Awards made as a result of the enactment of Public Law 88-108 are not valid and enforceable for at least a period of two years, or until May 6, 1966, but we cannot believe that the Con-

gress intended to allow a return of the confusion and chaos that impelled it to act, and if the contentions of the intervenors and defendants are sustained, then the entire Nation will be confronted again with precisely the situation that existed prior to the enactment of Public Law 88-108.

Therefore, plaintiffs' motion for summary judgment should be sustained, and an order is being entered today sustaining the motion and adjudging that Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913 of the General Assembly of Arkansas are in substantial conflict with Public Law 88-108, enacted August 28, 1963, 77 Stat. 132, 45 U. S. Sec. 157 (1964 Supp.), and the proceedings thereunder, and are therefore unenforceable against the plaintiffs; that the defendants, and their successors in office, and all persons acting under their direction and in concert with them, are enjoined and restrained from enforcing, or attempting to enforce, Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913, and from advising instituting, prosecuting, or aiding in any action, suit, or proceeding of any kind or character to recover from, or impose upon, or enforce against plaintiffs, their officers, agents or employees, or any of them, any penalty or damage for failure or refusal to obey, observe or comply with the provisions of said Acts or either of them, and from interfering with, or attempting to interfere with, or from advising, instituting, prosecuting, or aiding in any action, suit, or proceedings to interfere with, restrain or prevent plaintiffs, their officers, agents, or employees, or any of them, from operating trains, engines and employing switch crews within the State of Arkansas without complying with said Acts.

The order will further provide that the parties hereto shall pay their own costs.

This 5th day of March, 1965.

VAN OOSTERHOUT, Circuit Judge, dissenting.

The pleadings, the issues and the background material relating to this case are well stated in Judge Miller's opinion. All of us appear to be in agreement that the summary judgment cannot be granted upon two or three of the motion for summary judgment because of the existence of a dispute as to relevant material facts. I am inclined to agree

that no genuine issue as to material facts exists with respect to ground one of the motion based upon preemption.

I have no doubt whatever that the federal government can, if it chooses, by appropriate legislation preempt the field covered by the Arkansas statutes here under attack. My difficulty is that I cannot find any reasonable basis for saying that Congress has taken such action. The majority, in support of preemption, relies principally upon Public Law 88-108 discussed in the majority opinion. If it be assumed that the collective bargaining notices served by the parties became a part of the act providing for arbitration, I find nothing in the notices specifically proposing the abrogation of state crew consist statutes. Such statutes in my view do not fall within the notice provision for a rule to provide that "all agreements, rules, regulations, interpretations, and practices, however established, which conflict with the provisions of paragraph 1 of this rule shall be eliminated." In my view, parties cannot by agreement abrogate valid state safety statutes. The state of Arkansas has a legitimate interest in its health and safety laws.

While Public Law 88-108 contemplates that the arbitrators follow collective bargaining procedures as closely as possible and that an award shall be binding upon the parties, it is difficult to glean any Congressional intention that the arbitrators were given power to abrogate state safety laws.

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142, the Supreme Court states:

"The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the na-

ture of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. See, e.g. *Huron Portland Cement Co. v. Detroit, supra.*"

Thus contrary to the view of my brothers, I can find nothing in Public Law 88-108 or the arbitration award which manifests a Congressional intent to preempt the field covered by the Arkansas statutes.

I cannot agree that the legislative history if it is relevant helps the plaintiffs' position. At most it shows a controversy among members of Congress as to whether state safety regulations will be preempted by the law. I believe the majority's reliance upon the fact that the bill did not contain a disclaimer of an intent to preempt rests upon a weak foundation. I think it is more significant that there is no express or fairly implied statement of any attempt to preempt.

The Arkansas statutes which we are here considering have been before the Supreme Court on three prior occasions, as set out in the majority opinion, and they have been branded as measures for the protection of public safety. In *Missouri Pacific R. R. v. Norwood*, 283 U. S. 249, 252, the Court in holding the Arkansas statutes valid, states: "Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others." And at p. 256, in responding to a query as to whether Congress has preempted the field, answers, "in the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews."

The Supreme Court on numerous occasions has recognized the favorable position of state laws designed to protect safety. *Teamsters v. Oliver*, 358 U. S. 283, 297; *Terminal R. R. Ass'n. v. Brotherhood*, 318 U. S. 1; *Reid v. Colorado*, 187 U. S. 137.

Oliver did not involve a safety regulation but a conflict between federal labor law and a state antitrust law. The Court observes, "We have not here a case of a collective

bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." 358 U. S. 283, 297.

California v. Taylor, 353 U. S. 553, heavily relied upon by the majority, is clearly distinguishable. There the conflicting statute was a state civil service statute which prohibited collective bargaining and such a statute, of course, would obviously defeat the purpose of the federal Railway Labor Act. At footnote 8, p. 560, *Terminal R. R. Ass'n. v. Brotherhood*, *supra*, is cited and the observation is made that such case did not concern a conflict between federally protected collective bargaining and inconsistent state laws.

I recognize that my conclusion that Congress did not expressly preempt the field does not settle the matter. In *Local 20 v. Morton*, 377 U. S. 252, 258, the matter of the test to be applied when Congress has not expressly preempted the field is thus stated:

"The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95, 102. The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation."

In the *Florida Lime & Avocado Growers* case, *supra*, the Court in applying the foregoing test found that while the California standards were more restrictive than the federal standards, there was no inevitable collision between the two schemes of regulation, despite of the dissimilarity of the standards. At p. 146 of 373 U. S., the Court says that "while it is conceded that the California statute is not a health measure, neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers,"

Similarly here, it is possible for the plaintiff railroad to comply with the state law without violating federal law or the arbitration award. The award provides only for the minimum consist crews; there is no maximum fixed.

While it would be inconvenient and burdensome for the railroad to comply with the state safety laws, it is possible for them to comply with both the arbitration award and the state law. The arbitration board apparently did not consider the state statute preempted as in dealing with the firemen issue, the Board at p. 35 of its opinion mentions the laws of states requiring a fireman as a reason why individual carriers will not immediately stop assigning firemen on many freight engine crews. There is language in the Board's findings and in the findings of the Presidential Commission indicating that the question of the validity of crew consist laws is beyond the scope of the problem assigned to them.

I recognize that a strong case can be made for preemption in the situation here presented. Possibly it might have been wiser for Congress to have specifically preempted the field. However, such is a matter for Congressional determination, not judicial determination.

In my view, the real issue is the conflict between the operation of the federal statutes regulating interstate commerce and the Railway Labor Act and the state statutes under attack. It is quite true that courts at the present time take a more liberal view on the preemption issue than was held thirty or more years ago when the cases dealing with the precise Arkansas statutes here involved were decided. If this were a case of first impression, I might be persuaded to join in the majority opinion. It is possible that the Supreme Court as presently constituted might take a different view on the preemption problem presented in the earlier Arkansas cases. However, if any change is to be made in the application of preemption here, it should be made by the Supreme Court, not this court. The prior specific findings in the earlier cases, that the Interstate Commerce Act and the Railway Labor Act did not preempt the field covered by the Arkansas safety statutes, and the

favorable position given by the Supreme Court to state safety statutes, restrain me from holding that federal preemption here exists.

In ruling upon this motion, we do not reach the issue of whether the safety standards imposed by the Arkansas statutes are reasonable in the light of present conditions.

I would with some reluctance deny the motion for summary judgment on the preemption issue.

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN RAILWAY
COMPANY, MISSOURI PACIFIC RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and
THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiffs,*

v.

Civil Action No. 944

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR
THE SEVENTH JUDICIAL CIRCUIT OF ARKANSAS,
SUCCESSOR IN OFFICE TO LAWSON E. GLOVER,
AND JOHN W. GOODSON, PROSECUTING ATTORNEY
FOR THE EIGHTH JUDICIAL CIRCUIT OF ARKANSAS,
Defendants,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHER-
HOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF
RAILWAY CONDUCTORS AND BRAKEMEN, AND SWITCH-
MEN'S UNION OF NORTH AMERICA, *Intervenors.*

Judgment

On this 8th day of March, 1965, the above entitled cause having been submitted to the Three-Judge Court, composed of Circuit Judge Martin D. Van Oosterhout and District Judges Jno. E. Miller and J. Smith Henley, upon the plaintiffs' motion for summary judgment, and having considered said motion and the briefs of the parties in support of their respective contentions, and all other matters herein, the opinion of the majority and the dissenting opinion having heretofore been filed, and in accordance with the opinion of the majority,

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion for summary judgment be and the same hereby is sustained; that Act 116 of the Acts of 1907 and Act 67

of the Acts of 1913 of the General Assembly of Arkansas are in substantial conflict with Public Law 88-108, enacted August 28, 1963, 77 Stat. 132, 45 U. S. Sec. 157 (1964 Supp.), and the proceedings thereunder, and are therefore unenforceable against the plaintiffs; that the defendants, and their successors in office, and all persons acting under their direction and in concert with them, are hereby enjoined and restrained from enforcing, or attempting to enforce, Act 116 of the Acts of 1907 and Act 67 of the Acts of 1913, and from advising instituting, prosecuting, or aiding in any action, suit, or proceeding of any kind or character to recover from, or impose upon, or enforce against plaintiffs, their officers, agents or employees, or any of them, any penalty or damage for failure or refusal to obey, observe, or comply with the provisions of said Acts or either of them, and from interfering with, or attempting to interfere with, or from advising, instituting, prosecuting, or aiding in any action, suit, or proceedings to interfere with, restrain or prevent plaintiffs, their officers, agents, or employees, or any of them, from operating trains, engines and employing switch crews within the State of Arkansas without complying with said Acts.

IT IS FURTHER ORDERED AND ADJUDGED that the parties hereto pay their own costs of this action.

JNO. E. MILLER

United States District Judge

J. SMITH HENLEY

United States District Judge

APPENDIX B**Public Law 88-108****77 Stat. 132****88th Congress, S. J. Res. 102****August 28, 1963****Joint Resolution**

To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative

agreement was reached with respect to portions of such suggestion; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Not-

withstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of \$100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby

designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforceable through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred

and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

ARK. STAT. ANN. §§ 73-720 through 722 (1947)

(Arkansas Act 116 of 1907)

73-720. Crew required on freight trains. No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

73-721. Exceptions from Act—Purpose. This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

73-722. Penalty for violations—Exceptions. Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less

than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

ARK. STAT. ANN. §§ 73-726 through 729 (1947)

(Arkansas Act 67 of 1913)

73-726. Switch crews in cities—Requisite members. No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one (1) engineer, a fireman, a foreman and three (3) helpers.

73-727. Purpose of act—Number in crew may be increased. It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one (1) engineer, a fireman, a foreman and three (3) helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this Act.

73-728. Application of act to cities of first and second class—Exception. The provisions of this Act shall only apply to cities of first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred (100) miles in length.

73-729. Penalty for violation of act. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars (\$50.00), and each crew so illegally operated shall constitute a separate offense.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. _____

ROBERT N. HARDIN, Prosecuting Attorney
for the Seventh Judicial Circuit of
Arkansas, Successor in office to
LAWSON E. GLOVER and JOHN W. GOODSON,
Prosecuting Attorney for the Eighth
Judicial Circuit of Arkansas, _____ *Appellants*

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINMEN, BROTHERHOOD OF RAILROAD
TRAINMEN, ORDER OF RAILWAY CONDUCTORS
AND BRAKEMEN, AND SWITCHMEN'S UNION
OF NORTH AMERICA. _____ *Appellants and
Intervenors*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, MISSOURI PACIFIC
RAILROAD COMPANY, ST. LOUIS-SAN
FRANCISCO RAILWAY COMPANY, ST. LOUIS
TEXAS AND PACIFIC RAILWAY COMPANY _____ *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT OF APPELLANTS

Appellants, consisting of the original defendants and the intervening brotherhoods, referred to as Prosecutors and Brotherhoods respectively, have separately appealed from the judgment entered on March 8, 1965, of a convened three-judge panel in the United States District Court for the Western District of Arkansas. This judgment was rendered on application of appellees for a summary judgment which enjoined the enforcement of Act 116, Acts of Arkansas of 1907 and Act 67, Act of Arkansas 1913. This Statement is submitted to confirm that the Supreme Court of the United States has jurisdiction of this appeal and that several substantial questions of national significance, the interest of the State of Arkansas, and the railroad industry are presented in this cause.

OPINION BELOW

Neither the majority nor the minority opinions of the District Court have been reported. The verbatim opinions and the judgment are appended to the Brotherhoods' Statement as Appendix A.

JURISDICTION

This suit was instituted by appellees pursuant to the authority of 28 U.S.C. §§1331, 1332, 2201 and 2202 attacking the validity of two enactments of the General Assembly of the State of Arkansas. These acts, in essence, established minimum railroad crew consist in certain prescribed circumstances. A three-judge court was impaneled in accordance with 28 U.S.C. § 2281. The appellees originally alleged several alternative contentions of invalidity of the Arkansas Acts but the motion for

summary judgment on which relief was granted, limited consideration to issues of supremacy of federal legislation, the commerce clause and equal protection clause of the Constitution of the United States.

On March 5, 1965, a divided court agreed that there were genuine issues of material fact as to the commerce clause and equal protection contentions, but a majority held that the Arkansas statutes had been pre-empted by the passage of Public Law 88-108. The judgment and injunction prohibiting enforcement of the Arkansas statutes was entered on March 8, 1965.

Notices of appeal were filed by the Prosecutors on April 1, 1965, and by the Brotherhoods on March 17, 1965. The jurisdiction of the Supreme Court of the United States to review the decision below by direct appeal is authorized by 28 U.S.C. § 1253. *Florida Lime Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960). Moreover, this Court has previously granted review of an almost identical case. *Missouri Railroad v. Norwood*, 283 Ark. 249 (1931);

QUESTIONS PRESENTED

I. Whether an actual conflict or inconsistency exists between the Arkansas Acts in controversy, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which requires and has resulted in arbitration of labor disputes of Railroad Management and the Brotherhoods?

II. Has the Congress of the United States intended to deprive the State of Arkansas of its authority to legislate matters of safety by establishing minimum railroad crews in certain prescribed circumstances or did the

Congress of the United States by enactment of Public Law 88-108 pre-empt the State of Arkansas and responsible State officials from enforcing Act 116, Acts of Arkansas of 1907, and Act 67, Acts of Arkansas of 1913?

III. If Public Law 88-108 nullifies conflicting Arkansas Statutes or merely suspends and prohibits the enforcement of those Statutes for the duration of the national arbitration and awards pursuant to Public Law 88-108?

UNITED STATES STATUTES INVOLVED

This case involves the application of Public Law 88-108, 77 Stat. 132, 45 U.S.C. A. § 157 (Supp. 1964). This Statute is set forth in Appendix B of the Brotherhoods' Statement.

ARKANSAS STATUTES INVOLVED

This litigation also involves Act 116, Acts of Arkansas of 1907, codified as Ark. Stat. Ann. §§ 73-720 through 73-722, and Act 67, Acts of Arkansas of 1913, appearing at Ark. Stat. Ann. §§ 73-726 through 73-729. These Statutes are appended to the Brotherhoods' Statement in Appendix B.

STATEMENT

The history of the litigation challenging the Arkansas statutes involved here may properly be described as long and complicated. Act 116, passed in 1907, requires, in essence, that freight trains with certain exceptions shall have a minimum crew consisting of an engineer, fireman, conductor and three brakemen. This statute was unsuccessfully attacked as an unconstitutional regulation of commerce, a denial of equal protection and deprivation of property without due process. *Chicago R. I. & Pac. R. Co. v. Arkansas*, 219 U.S. 453 (1911). Act 67, enacted in 1913, with certain exceptions requires that a minimum crew of an engineer, fireman, foreman and three helpers be maintained for switching operations in cities of the first and second class. This legislation also withstood similar allegations of invalidity. *St. Louis I.M. & S. Ry. v. Arkansas*, 240 U.S. 518 (1916). Both of the enactments were tested again on the identical contentions and, in addition, were alleged to have been pre-empted by the Interstate Commerce Act and the Railway Labor Act. *Missouri Pac. R. R. v. Norwood*, 283 U.S., 249 (1931), 290 U.S. 600 (1933).

This cause on appeal was instituted by appellees, six interstate railroads, on April 10, 1964. The complaint, consisting of twenty-four pages, alleged a varied attack on the constitutionality and application of the two Arkansas Statutes.

Again, Act 116 and Act 67 were assailed by the familiar assertions of invalidity. However, a new tact was involved. Appellees contended that the Arkansas statutes had been pre-empted by Public Law 88-108. In 1963, the United States Congress enacted this measure

to require arbitration of labor disputes and avert a national crisis. Among other things certain minimum crew consist, with exceptions, were established.

Five Brotherhoods of the railroad industry were given leave to intervene. The Brotherhoods then moved to dismiss the complaint and this application was denied. The complaint was answered and certain preliminary discovery procedures were instituted. Appellees subsequently gave notice and moved from summary judgment on the basis that Public Law 88-108 had superceded the Arkansas Statutes, that the Arkansas Statutes were discriminatory, and that the Arkansas Statutes denied appellees equal protection of the law. This motion was submitted to the Court on appellees' motion with exhibits, responses to the motion and briefs by the parties.

On March 5, 1965, the District Court rendered its decision. While each of the three judges agreed that there were substantial factual issues in controversy concerning discrimination and equal protection, two of the judges determined that Public Law 88-108 did supercede the Arkansas Statutes and awarded judgment to appellees. The third judge held that there was no conflict between the federal and state enactments and that no substantial evidence could be discovered to require pre-emption of the Arkansas Statutes by Public Law 88-108. Judgement was entered on March 8, 1965, enjoining the Prosecutors from attempting to enforce Act 116 and Act 67. An application to the District Court by the Brotherhoods to stay the injunction was unanimously denied. Subsequently, a stay was ordered by Mr. Justice Byron R. White pending the decision of this Court upon the jurisdictional aspects of this case. An effort to modify this order was denied on April 2, 1965.

Leave was granted so that the Prosecutors would not be required to comply with Rule 15 (l) (h) and (i) to append the opinion and judgment of the court below since this information appears as an appendix to the Brotherhoods' Statement.

THE QUESTIONS ARE SUBSTANTIAL

The majority opinion of the District Court is in direct conflict with the previous rulings of this Court. This may not be a literally correct and precise statement. The District Court declared the Arkansas Statutes heretofore determined by this Court to be constitutional had been pre-empted by Public Law 88-108. Although this aspect of Public Law 88-108 has not been examined by this court, an appraisal reveals the judgment of the court below to be inconsistent with the established policy and contrary to the interpretations of this Court concerning the issues involved. Cf. *Missouri Pac. R.R. Co. v. Norwood*, *supra* 283 U.S. 249 (1931), 290 U.S. 600 (1933). If the decision is permitted to stand, the authority of the General Assembly of Arkansas to legislate matters of public safety governing railroads in Arkansas has been effectively thwarted.

It is no exaggeration that the decision of the District Court has national implications. The decision will have a profound effect on the entire railroad industry in the United States.

To emphasize the magnitude of the issues involved, attention is invited to similar litigation now pending over this Nation. E.g. *Chicago, M. St. P. & Pac. R. R. v. Pearson*, No. 6214 (E. D. Wash.) (Rev. Code Wash. §§ 81-40.020, 81-40.030 (1951); *New York Cen. R. R. v. Lefkowitz*, No. 6024/1961 (Sup. St. N. Y., Westchester County) *McKINNEY'S CONSOL. LAWS N. Y.*, Book 48, §§ 54-a, 54-b, 54-c (1952)); *New York Cen. R. R. v. Public Service Comm.*, No. S64-3643 (Marion County, Ind., Super. Ct.) (Burns Ind. Stat. Ann. §§ 55-1326 through 1338 (Repl. Vol. 1951)). Thus, the issues are not only extremely important to the State of Arkansas, but to each of the several states as well.

There is No Conflict Between the Arkansas Acts and Public Law 88-108.

The majority opinion of the United States District Court declared that there was an actual conflict between the Arkansas Acts in controversy and Public Law 88-108. As previously noted, it is significant that both Act 116 and Act 67 have been justified and upheld on the basis as a reasonable exercise of police power of the State of Arkansas for the safety and protection of the general public. On the other hand, Public Law 88-108 evolved from a threat of an impending national labor dispute between railroad management and the brotherhoods. Evidence supporting this fact is voluminous. Pursuant to this authority, national mediation was undertaken and in certain circumstances special boards were created to arbitrate in special areas. In every instance known to the prosecutors, the awards were directed solely to alterations of certain work rules and agreements between the parties.

The award merely established minimum crew consist. Management is not restricted in any way from enlarging upon the minimum crews. Thus, it is inconceivable that independent state legislation requiring greater minimum crew consist would be inconsistent or conflict with the arbitration awards. *Florida Line & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 at 146. It is supposed that even at this time, that occasionally because of traffic congestion, inclement weather, nature of the train load or a variety of other events may compel the railroad management to assign additional firemen or brakemen over the prescribed minimums announced by the arbitration award or the Arkansas statutory schedules. By so doing, railroad

management would not violate either the spirit or the letter of the Arkansas Statutes, or the arbitration awards.

The minority opinion of the court below observed:

“In *Local 20 v. Morton*, 377 U.S. 252, 258, the matter of the test to be applied when Congress has not expressly preempted the field is thus stated: ‘The basic question, in other words, is whether “in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.”’ *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102. The answer to that question ultimately depends upon whether the application of state law in this kind of cases would operate to frustrate the purpose of the federal legislation.’ ”

and then concluded:

“While it would be inconvenient and burdensome for the railroad to comply with the state safety laws, it is possible for them to comply with both the arbitration award and the state law.”

It is submitted, therefore, that the inconsistency or conflict urged by appellees and found by the United States District Court is more apparent than real and more contrived than known.

II

Public Law 88-108 Does Not Supersede the Arkansas Acts.

The lower court held that Congress, by the enactment of Public Law 88-108 purposely or effectively preempted the State of Arkansas from enforcement of Act 116 and Act 67.

It is a well settled principle of statutory construction that there is no presumption of repeal or pre-emption by implication. On the contrary, pre-emption will only be found by specific expression or where there is an actual conflict between two schemes of regulations. Neither ingredient is present in this litigation. But the majority below determined that since no statement of non-pre-emption was written in Public Law 88-108, then it must be concluded that Congress intended to supersede the State full crew laws.

In the recent case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), a smoke abatement ordinance was held valid against an attack that the mere existence of Federal inspection laws had pre-empted the entire field.

After determining that the Federal inspection laws covered many subjects involving the maintenance of steam vessels, but that they were not specifically directed toward the local health and safety aspect covered by such ordinance, it was stated:

"We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. *To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. Savage v. Jones, 225 U.S. 501; Welch Co. v. New Hampshire, 306 U.S. 79; Maurer v. Hamilton, 309 U.S. 598.*" (Emphasis added.)

It is submitted furthermore that Public Law 88-108 is clear and unambiguous. The purpose and mechanics of the national arbitration were set out in detail. Under

these circumstances, it was not proper for the District Court to search for legislative intent. Even so, the expression of members of Congress during the consideration of the Joint Resolution, with few exceptions, is consistent with the language of the act that State minimum crew laws were not to be disturbed.

The provision of Public Law 88-108 that arbitration shall only extend for a defined period of two years lends much credit to the Prosecutors' contention that there was no intention by the Congress of the United States to infringe upon existing authority of States to enact minimum crew consist.

III

Duration of Public Law 88-108

By the specific terms of the Joint Resolution, it is to expire within two years. Public Law 88-108 § 4. There is grave doubt, if an actual conflict exists, as to whether Public Law 88-108 merely suspends enforcement of Acts 67 and 116 for the duration of the national award or nullifies completely the conflicting Arkansas Statutes.

There is authority to support the revival of a suspended statute. 1 *Southerland Statutory Construction*, § 2027. The decision of the District Court arrived at a different conclusion and held, despite the language of Congress to the contrary, that "we cannot believe that Congress intended to allow a return of the confusion and chaos that impelled it to act"

The holding of the District Court is lacking in both law and fact. Courts should not look to the wisdom or expediency of the legislation, but should confine review to the narrow constitutional issue. *Beauharnais v. Illinois*, 343 U.S. 250 (1951).

CONCLUSION

It is submitted that the majority of the District Court erred by failing to properly apply the guides and pronouncements of this Court.

The questions involved in this course are of such magnitude that review should be granted.

April 13, 1965.

Respectfully submitted,

BRUCE BENNETT

Attorney General

State of Arkansas

JACK L. LESSENBERRY

Counsel for Appellants

Justice Building

Little Rock, Arkansas

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 1054 and 1070

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, *Appellants*

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,
Intervenor-Appellants

V.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY.
Appellees

On Appeal from the United States District Court for the Western District of Arkansas

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on

the ground that the question is so insubstantial as not to warrant further argument.

QUESTIONS PRESENTED

The question presented by this Motion to Affirm appears to us to be:

1. Does Congress' mandate of compulsory arbitration of train crew manning level disputes, set forth in Public Law 88-108, and the Award entered in that arbitration, preclude the operation of the Arkansas laws prescribing minimum railroad crew consists?

If the judgment is not summarily affirmed the following further questions are presented:

2. Does the Congressional scheme for regulation of controversies between labor and management in the railroad industry, embodied in the Railway Labor Act, and for the regulation of interstate commerce expressed in the National Transportation policy, preclude the operation of the Arkansas laws prescribing minimum railroad crew consists?
3. Do the Arkansas laws in question constitute discriminatory legislation against interstate commerce, in violation of the Commerce Clause?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Public Law 88-108, 77 Stat. 132, 45 U.S.C. following § 157, Arkansas Act 116 of 1907 (Ark. Stat. Ann. §§ 73-720 through 722 (1947)), and Arkansas Act 67 of 1913 (Ark. Stat. Ann. §§ 73-726 through 729 (1947)) are set forth in Appendix B, pp. 68-73, to the Jurisdictional Statement in No. 1054. In addition, there are also involved the Commerce Clause of the United States Constitution, which is set forth in Appendix I hereto (p. 1a), the National Transportation Policy, 54

Stat. 899 (1940), 49 U.S.C. preceding § 1, which is set forth in Appendix II hereto (p. 1a), and the Railway Labor Act, 48 Stat. 1185, as amended, 45 U.S.C. §§ 151 *et seq.*, particularly §§ 2 and 5 through 10 thereof, which sections are set forth in Appendix III hereto (pp. 2a-23a).

In addition, certain provisions of the Award of the National Arbitration Board No. 282—*Eastern, Western, and Southeastern Carriers' Conf. Comm. and Brotherhood of Locomotive Engineers*, 41 Lab. Arb. 673 (1963)—and of the Awards of the local boards with respect to Missouri Pacific Railroad Company, 42 Lab. Arb. 917 (1964), and The Texas & Pacific Railroad Company, are set forth in Appendices IV and V hereto (pp. 24a-39a). The full texts of the National Arbitration Award and of these local awards are set forth in Plaintiffs' Exhibits 4 and 5 in support of Plaintiffs' Motion for Summary Judgment.

STATEMENT

This is a direct appeal from the final judgment entered on March 8, 1965, by a district court of three judges convened pursuant to 28 U.S.C. §§ 2281 and 2284, declaring two Arkansas railroad "crew consist" laws to be in substantial conflict with Public Law 88-108, 77 Stat. 132 (1963), and therefore unenforceable against appellees, and granting an injunction against the enforcement of the Arkansas laws. (Tr. 118)

The circumstances giving rise to the enactment of Public Law 88-108 are thoroughly reviewed in the opinion of the district court. (*Chicago, Rock Island & Pac. R. Co. v. Hardin*, 239 F. Supp. 1, 9-11; Juris. St. No. 1054, at 24-28)

Briefly stated, in 1959 and 1960 the railroads on the one hand, and the five railroad operating brotherhoods

on the other, served notices pursuant to Section 6 of the Railway Labor Act as to the subject of the minimum consist of engine and train crews. The railroads proposed to eliminate prior agreements requiring the use of firemen on diesel engines and requiring stipulated numbers of other crew members, and to restore these matters to management discretion. The brotherhoods' proposals were to establish new national rules fixing the minimum crew consist as an engineer, a fireman, and a conductor and two trainmen. In 1960, a Presidential Railroad Commission was established to investigate the facts and make recommendations for the resolution of the dispute arising out of the notices. In 1962 the Commission issued a report which recommended the elimination of firemen in freight service, and recommended procedures whereby the number of brakemen and switchmen would be reduced.

The recommendations of the Presidential Railroad Commission were accepted by the railroads but rejected by the brotherhoods. An effort at mediation through the National Mediation Board was attempted but the National Mediation Board terminated its services when the brotherhoods rejected a proffer of arbitration. See *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963) (holding that the parties were then left to self-help).

Under Section 10 of the Railway Labor Act, the President then created an Emergency Board to investigate and make recommendations respecting the dispute. The Emergency Board's recommendations, submitted on May 13, 1963, were accepted by the railroads but rejected by the brotherhoods. In the face of a clear threat of a nationwide rail strike, the President then requested passage of legislation to deal with the

train manning controversy. Congress' response to this request was Public Law 88-108, imposing compulsory arbitration upon the parties.

The purpose and effect of the Act were well characterized by the court which enforced the Award of the Arbitration Board entered under the Act:

"Just as it [the Congress] has assumed power to regulate rates, through regulatory commissions, so it is now assuming power in this case to regulate working conditions, wages and similar matters through an Arbitration Board."

Division 700, Brotherhood of Locomotive Engineers v. National Railway Labor Arb. Bd. No. 282, 223 F. Supp. 377, 378 (1963). The Act represents the first occasion that Congress has exercised its unquestionable power to provide for the regulation of train crew manning levels and other "crew consist" matters.

The Arkansas laws in question were enacted in 1907 and 1913 and require crews of six men (including three trainmen) on all trains, with certain exceptions, and on switching movements under certain specified circumstances.¹ Moreover, they require, as one of the

¹ The 1907 legislation relates to freight trains and provides that each such train must have a crew "consisting of not less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided." The exceptions provided in this Act exempt railroad companies whose lines are less than 50 miles in length, and trains of fewer than 25 cars.

The 1913 legislation relates to switch crews operating in cities of the first and second class where switchings are being made "across public crossings within the city limits of the cities." (Cf. Item C(2)(h) of the Award, note 3, *infra*.) The minimum crew provided for in this act is a crew of "one (1) engineer, a fireman, a foreman, and three (3) helpers." However, there is an exception provided for companies operating railroads less than 100 miles in length.

six, a fireman on every such train or switching movement.

The Award of the Arbitration Board, made pursuant to the mandate of Public Law 88-108, in general permitted the abolition of 90% of the firemen's positions in freight service on the railroads. The Award accorded generous protection to the displaced employees. Thus, in substance the Award provided that any fireman with at least ten years' seniority must be retained in engine service, that is, as a fireman or engineer. Moreover, any fireman with between two and ten years' seniority must either be retained in engine service or offered a comparable position. If he accepts a comparable position he must be guaranteed annual wages and paid necessary relocation allowances; and if he refuses the comparable position he nonetheless receives substantial severance allowances. The employment of firemen with under two years' seniority may be terminated, but only upon payment of substantial severance allowances.

In determining that the carriers should be free to abolish 90% of the firemen's positions, the Board focused its attention principally upon the question of safe operations of the trains. The Congress directed, in section 7 of Public Law 88-108, that the Board give due consideration to this factor, and the Board left no doubt that it complied with this instruction:

"Of these three considerations [safety, burden on other crew members, and adequacy of service], that of safety of railroad employees and equipment seems to us, in the context of this case, to require the most careful attention.

"This last observation merits a brief additional comment and explanation. It may be fairly stated that concern with safety has pervaded this entire

proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel. . . ." (Op. Neutral Members, 41 Lab. Arb., at 688).

The Award also made provision for a binding local arbitration procedure whereby the number of crew members—apart from firemen²—to be used in road freight and yard crews was to be fixed on a local basis by Special Boards of Adjustment. The Award carefully and in detail instructed the local Special Boards of Adjustment to analyze the safety factors involved in the fixing of minimum crew levels in their areas.³

² The crew members the determination of which was to be left to local arbitration were the crew members apart from the locomotive crew. The national Board had, as we have noted, ruled as to the issue of the maintenance of firemen in the diesel freight locomotives.

³ The Arbitration Board instructed the Special Boards of Adjustment to use the following guidelines in reaching their decisions:

"C(1). The special board of adjustment in making its decision shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

"C(2). General Considerations.

- (a) Assurance of adequate safety.
- (b) Avoidance of unreasonable burden or workload on members of the crew.
- (c) Changes in operating conditions, including density of traffic.
- (d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
- (e) Special conditions which exist on any particular assignment.
- (f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
- (g) Physical characteristics of the line to be traversed and in

Such boards have made local Awards with respect to the operations of each of the appellees, and the awards so made regarding the Missouri Pacific Railroad Company and The Texas & Pacific Railroad Company were received in evidence as typical. The local Award with respect to the Missouri Pacific made it clear that "basically" all the guidelines under which it was rendered "relate to safety of operation or workload." (P. 33a, *infra*.)

Here again, as in the case of firemen, the Award contained liberal job protection provisions. Thus, train service employees, other than those furloughed (and thus not working) on the effective date of the Award, are entitled to continue to work in train service until their employment is terminated by natural attrition, such as death, disability, retirement, or discharge for cause.

The local Awards provide for smaller freight and yard crews than do the Arkansas laws, and thus here again (as in the case of the firemen) there is a flat conflict between the product of the Congressionally-ordained compulsory arbitration and the state laws. For example, the Award respecting Missouri Pacific operations in Arkansas fixes the minimum crew re-

the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

- (h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
- (i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings of intersections.
- (j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
- (k) The presence or absence of a fireman in the engine service crew." (See pp. 28a-30a, *infra*.)

quirement of main line local freight trains at two brakemen, and the Arkansas freight crew law requires three. The Award fixes the minimum crew for all classes of road service on branch lines at one brakeman, and the state law requires three. The minimum crew in yard service is fixed by the Award at one helper (except for four yards, one of which is in Arkansas), while the Arkansas switch crew law requires a minimum of three helpers. The Award further provided that no helper shall be required in the Paragould, Arkansas, yard, but the state law requires a minimum of three.

This action was commenced on April 10, 1964, by six interstate railroads operating in Arkansas against certain state prosecuting attorneys, seeking an injunction against their continued enforcement of the Arkansas "crew consist" laws. (Tr. 1) The railroad brotherhoods, appellants in No. 1054, intervened. (Tr. 26)

The district court held that these Arkansas laws "are in substantial conflict with Public Law 88-108", concluding:

"The attacked statutes constitute an obstacle to the accomplishment of the federal aims and purposes and frustrate the national scheme of regulation, and must be deemed superseded by the federal legislation." (239 F. Supp., at 27-28; Juris. St. No. 1054, at 57)⁴

⁴Largely because of the holding of this Court in *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249 (1931), that these state laws were not preempted by the Railway Labor Act and the Interstate Commerce Act, as those federal statutes then stood, the dissenting judge deferred to this Court with respect to an application of the preemption doctrine based on the federal statutes as they now exist. However, on the merits of the preemption question he did observe: "I recognize that a strong case can be made for preemption in the situation here presented." (See note 7, pp. 13-14, *infra*.)

The prosecutors and the Brotherhoods appealed to this Court. (Tr. 123, 130) On March 27, 1965, after the District Court had unanimously declined to stay its injunction, (Tr. 122) Mr. Justice White granted a stay of that injunction, conditioned on the appellants' meeting an accelerated schedule for the filing of Jurisdictional Statements, and Reply Briefs to any Motion to Affirm.

ARGUMENT

1. The decision of the District Court is clearly correct on the basis on which it was rendered. The effect of Public Law 88-108, and of the Award rendered under it, on state legislation providing for mandatory jobs and mandatory minimum crew levels on train crews varying from those provided under the Award is so plain as not to require further briefing and oral argument. On this basis, and in the interest of expeditious termination of this controversy, we urge summary affirmance of the judgment of the District Court.⁵

The decisions of this Court leave no room for doubt respecting the preempting effect of federal labor legislation passed pursuant to Congress' paramount power to regulate interstate commerce. In one of the leading cases in the area, this Court has held that a state statute must give way even to the terms of a collective bargaining agreement negotiated pursuant to the provisions of the National Labor Relations Act, the counterpart of the Railway Labor Act in fields other than those of rail and air transportation: "The paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an

⁵ We note that in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963), the Court summarily disposed of an earlier aspect of this general controversy, doubtless in the interest of prompt resolution of the issues involved.

enactment of Congress." *Teamsters Union v. Oliver*, 358 U.S. 283, 296-97 (1959). See also, *Teamsters Union v. Morton*, 377 U.S. 252 (1964).

Similar results have been held to follow under the Railway Labor Act, which, like the National Labor Relations Act, establishes a national policy of uniform application. Thus, this Court has held state legislation inconsistent with railroad collective bargaining contracts to have been superseded by the Railway Labor Act. In *California v. Taylor*, 353 U.S. 553, 567 (1957), the Court said:

"Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally-protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws."

Accordingly, even if the Awards made pursuant to Public Law 88-108 were regarded as collective bargaining agreements made under the authority of an Act of Congress, their terms would supersede conflicting state laws. However, they are not simply collective bargaining agreements. They are directives made by governmental agencies, acting within guidelines laid down by the Congress, and considering a variety of public interest factors, to which Congress lawfully delegated its authority to fix minimum train crew employment levels on the nation's railroads.*

*None of the appellants raise any question respecting the validity of the Award of Arbitration Board No. 282. Its validity was sustained in all respects in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C. 1964) where it was held that Congress had in this instance made a lawful delegation of its legislative power to the Arbitration Board. The Court of Appeals affirmed, 331 F.2d 1020 (D.C. Cir. 1964), and this Court denied certiorari, 377 U.S. 918 (1964).

The conflict between the Arkansas minimum train crew consist laws and the Arbitration Award entered under Public Law 88-108 is obvious and clear. The Act empowers and directs the Arbitration Board to fix the size of minimum train crews. This was at the heart of the vexed question which the Board was directed to take in hand. The Board has done so. The state laws in question also purport to fix the size of train crews and prescribe minimums which are in excess of and at variance with those fixed by the Board or under the local awards provided for by the Board. The Commerce Clause and the Supremacy Clause ordain that the conflict must be resolved in favor of the Award entered under the federal mandate.

The District Court rightly rejected the fallacious contention that there was really no conflict between the federal and state requirements as to crew manning levels because both spoke in terms of minimums so that the railroads could easily comply with both sets of criteria by simply applying the higher of the two differing minimums.

This argument is as much at variance with the precedents as it is lacking in logic. The whole point of the issue before the Arbitration Board was, what was the minimum level of crew manning at which the railroads were to be authorized to operate trains? It would completely frustrate the effect of the Award for the states to be permitted to declare that the railroads were not authorized to have their trains manned at the levels permitted by the Board. It would take away an area of management discretion and economic freedom which the Board intended the railroads to have.

It has been held by this Court in this area that where federal law authorizes—though it does not require—a

particular collective bargaining agreement, state legislation prohibiting it must give way. Thus, in *Teamsters Union v. Oliver, supra*, the mere fact that federal law authorized the parties to enter into the contract in question—although it certainly did not require them to enter into a contract containing those terms—was sufficient to prevent application of a state law which prohibited the arrangement. Likewise, in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), it was held that national banks could advertise the existence of their “savings” accounts, despite a state statute which forbade any but certain specified banks from using the word “savings” in advertising. This holding was reached simply on the basis of the authorization in the National Banking and Federal Reserve Acts to national banks to accept savings accounts—although the national banks were perfectly free, as a matter of federal law, not to advertise the availability of savings accounts or not to use the word “savings” in that advertising.

The District Court’s exhaustive opinion is such a clear presentation of the historical facts involved and so convincingly dispositive of the question as to the effect of Public Law 88-108 on the state laws, that we respectively submit that this case is an appropriate one for affirmance without further briefs or oral argument.⁷

⁷ Should the Court note probable jurisdiction, we will argue that, even apart from Public Law 88-108, in the light of the recent decisions of this Court on preemption in the labor relations field, the Arkansas crew consist laws would be preempted by the Railway Labor Act and by the National Transportation Policy—which was not enacted when this Court last upheld the Arkansas crew consist laws in *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249 (1931). See *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (relying

2. On prior occasions, the Arkansas crew consist laws have been upheld against claims of conflict with the Commerce Clause or with the Railway Labor Act, on the ground that they amounted to permissible local safety regulations. See *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 255-56 (1931); *Chicago, Rock Island & Pac. R. Co. v. Arkansas*, 219 U.S. 453 (1911); *St. Louis, Iron Mountain & Sou. R. Co. v. Arkansas*, 240 U.S. 518, 521 (1916). And, to be sure, in *Teamsters Union v. Oliver*, 358 U.S. 283, 297 (1959), this Court indicated that a "local health or safety regulation" might, under some circumstances, be upheld despite a conflict with a collective bargaining contract which federal law empowered labor and management to make.—The Jurisdictional Statements rest primarily upon this so-called "safety regulation" exception to the rule of the *Oliver* case.

This attempted exception from the rule that a state statute must bow to a federally-sanctioned collective bargaining agreement—or arbitration award—patently cannot be sustained in this case. We start with the fact that whatever might be thought to be the

on National Transportation Policy in holding unconstitutional Arizona train length law). The law on preemption in the labor field was so little developed in 1931 that this Court's entire discussion of the problem in *Norwood* consisted of the following: "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration." 283 U.S., at 258.

Moreover, should probable jurisdiction be noted, we will also urge as a basis for affirmance of the judgment the point that the Arkansas laws constitute a constitutionally impermissible discrimination against interstate commerce. This is because the exemptions contained in the laws are such as, in fact, to exempt all intrastate railroads and restrict the application of the laws to interstate railroads. *Cf. Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

"safety" justification of the crew consist laws, they clearly are totally different from the normal sort of industrial health or safety laws which deal with such subjects as safety equipment, provision of protective clothing, factory ventilation, washroom conditions and so forth.⁶ The unvarnished fact of the matter is that the "crew consist" laws are laws guaranteeing a specified arbitrary number of jobs on each operating train. They may possibly be thought to have some safety aspects but predominantly they are "full employment" legislation,⁷ directly regulating what has been for many years the central labor-management problem in the railroad industry: the problem of the number of jobs to be provided on each train. The laws thus seek "specifically to adjust relationships in the world of commerce." (*Teamsters Union v. Oliver*,

⁶ Listing the sort of permissible state health and safety laws in *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943), this Court specifically mentioned: "sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection."

⁷ See Lecht, *Experience Under Railway Legislation* (1955), pp. 93-94: "Trainmen and firemen assumed the lead in pushing full-crew bills because unemployment was particularly severe among their members."

Slichter, *Union Policies and Industrial Management* (1941), p. 187:

"One of the most ambitious efforts to make work by requiring excessive crews, or the employment of unnecessary men, is being made (with great success) by the train service unions on the railroads. These unions have been spurred to require the employment of unneeded men by the great drop in the employment of train service employees. The train service unions have used three principal methods to make work: (1) support of legislation, either requiring full crews or limiting the length of trains; (2) retaining obsolete rules which make work; and (3) enforcing the interpretations of rules so as to make work and to penalize the roads for using economical methods of operation."

supra, at 297.) They frontally attack one aspect of what is a nation-wide problem in labor-management relations: the question of how far the introduction of modern equipment and automatic devices will be allowed to have its natural effect of reducing employment in certain obsolete job categories.¹⁰ To the extent that there are safety aspects to this question, these aspects are completely intertwined with the basic economic questions.

Thus, the short answer to the claim that, as purported safety regulations, these laws can stand despite their conflict with the arbitration award, is found in Section 7 of Public Law 88-108. There, the Arbitration Board was commanded, in making its award, to give "due consideration to the effect of the proposed award upon adequate and safe transportation service." Congress, in providing an arbitrated solution to the economic problems involved in the crew level question on the nation's railroads, ordained that any safety questions involved should be taken into account. And the opinion of the neutral members of the Board which we have

¹⁰ As the opinion of the neutral members of the Board (41 Lab. Arb., at 688) stated:

"[T]he size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

reviewed in the Statement, makes it plain that they fully considered the safety aspects of the elimination of the superfluous jobs which was provided in their award, and ordered that the local boards give the fullest consideration to safety factors.

Thus, unlike the situation prevailing on previous reviews of this or similar state legislation, Congress here took in hand the entire problem of crew levels on the nation's railroads—the safety aspects as well as the predominant economic aspects of the question.¹¹ It authorizes and directed its creature, the Arbitration Board, to make an award dispositive of the whole question. Upon this basis, the narrow “safety” justification under which these crew consist laws have been upheld in the past can no longer stand. Once Congress has entrusted the question of safety as affected by crew levels on trains operated by interstate carriers to the Arbitration Board, inconsistent state regulation or crew levels could no more stand as a regulation of safety than it could as a frank, undiluted economic regulation of a matter for which the parties in a collective bargaining contract, or a compulsory arbitration board, had provided a solution.

3. Appellants claim that the legislative history of Public Law 88-108 indicates that the Congress did not intend that state full crew laws be preempted by the arbitration award. Since the preemptive effect of the statute and the Award is plain on the face of their provisions, this contention is irrelevant. However, the fact of the matter is, as the lower court observed, “If any rational conclusion can be drawn from a legislative history on the question . . . it is that the Congress

¹¹ “When Congress set up compulsory arbitration to settle the locomotive helper-fireman question, it specified safety as a guideline to be considered in the arbitrators’ decision.” Advertisement, Brotherhood of Locomotive Firemen and Enginemen, N.Y. Times, May 9, 1965, § IV, p. E-5.

intentionally elected not to include a saving provision for such laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis." (239 F. Supp., at 23; Juris. St. No. 1054, at 49)

Thus, while it is true that Representative Harris stated on the floor of the House that he did not believe state laws would be affected by the bill, he was immediately challenged by Congressman Smith, Chairman of the Committee on Rules, which had considered the bill.¹² Moreover, during the hearings on the bill pro-

¹² "MR. SMITH OF VIRGINIA. Mr. Speaker, the colloquy between the gentleman from California [Mr. Sisk], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. Harris], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

MR. EDMONDSON. Mr. Speaker, will the gentleman yield?

MR. SMITH OF VIRGINIA. I yield to the gentleman from Oklahoma.

MR. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point. Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

MR. SMITH OF VIRGINIA. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce." (109 Cong. Rec. 15273 (1963)).

posed by the President, which would have assigned to the Interstate Commerce Commission essentially the same responsibility that was delegated under the Public Law to the Board, representatives of the Government several times brought to the attention of the House committee that the bill did not contain a provision that would avert preemption of state crew consist laws, and that if the Congress did not intend such preemption a saving clause should be included.¹³

¹³ "THE CHAIRMAN. I asked about that myself, Mr. Secretary. Is there anything in the Interstate Commerce Act which gives recognition to full-crew laws of the various States?"

SECRETARY WIRTZ. I would want to answer subject to check, but I think not.

THE CHAIRMAN. It is my impression that there is not, but the courts have upheld full-crew laws in the various States.

SECRETARY WIRTZ. That is correct.

THE CHAIRMAN. That being true, I wish that you, if your counsel is with you, would point out to me anywhere in this resolution in which this would not supersede the full-crew laws or any other matters involved with work rules as contained in these notices.

SECRETARY WIRTZ. I think to the best of our knowledge, there would not be anything specifically that had that result.

THE CHAIRMAN. I agree with Mr. Sibal, then, that research would be necessary, because it would seem to me the logical conclusion is that this gives the Interstate Commerce Commission authority to supersede these laws.

SECRETARY WIRTZ. I would respect your views, sir, completely on it."

(Hearings before House Committee on Interstate and Foreign Commerce, on H. J. Res. 565, 88th Cong., 1st Sess. (1963), pp. 111-113.)

The question was again raised during testimony before the same Committee by Mr. Ginnane, counsel for the Interstate Commerce Commission, who analyzed the effect of the bill as then drawn on the state crew consist laws:

"MR. GINNANE. * * * It could be argued that if the Commission approves, for example, interim rules changing crew consist, that by virtue of paragraph 1 that would cut across State crew laws. I

In sum, it is clear at the least that the legislative history cannot detract from the clear preemptive force of the statute and the Award, even assuming *arguendo* that the legislative history does not affirmatively support the judgment below.

4. The two year period provided by Public Law 88-108 for the life of the Award, as such, expires on January 25, 1966 as to the provisions relating to crew

understand that the Secretary of Labor has testified here that that was not an intended result.

THE CHAIRMAN. That is true.

MR. GINNANE. If the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done simply by making clear in section 1, perhaps parenthetically that paragraph 11 is not to apply.

THE CHAIRMAN. I appreciate your very frank response, because I think it has sort of been left up in the air as to what the courts might do. There has been expression as to what is intended and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed. I believe you have covered the other notations that I have made already and there is no need to go over them again."

(Hearings before House Committee on Interstate and Foreign Commerce, *supra*, p. 614.)

Mr. Ginnane also cautioned in testimony before the Senate Committee on Commerce that if the Congress did not intend to preempt state crew consist laws then an expression of intent to preserve the state laws should be included in the bill.

"MR. GINNANE. * * * I heard the Secretary of Labor testify yesterday that that was not intended, that they did not intend, by drafting a bill which would authorize the Commission to take only interim action, valid for only 2 years, to brush aside the permanent State full-crew laws.

If it were desired to make that absolutely certain, if that is the desire of Congress, it can be done by just a phrase which would exclude paragraph 11 of Section 5 of the Interstate Commerce Act."

(Hearings before Senate Committee on Commerce on H. J. Res. 565, 88th Cong., 1st Sess. (1963), pp. 400-401.)

members, and on March 31, 1966 as to the provisions relating to firemen. Thereafter, the terms fixed by the Award will govern the relationships between the parties until changed in the manner set forth in the Railway Labor Act.

The District Court held that Public Law 88-108, together with the Award rendered under it, preempted the Arkansas laws permanently, thereby rejecting the contention of the appellant that whatever might be the situation during the two year period specified in the Award pursuant to Section 4 of Public Law 88-108, thereafter those laws would again be operative. Although the brotherhoods do not raise this contention here and the appellant prosecutors do not appear to stress it, it is worth while to indicate why the lower court was plainly correct as to this matter.

It is apparent that by entering the field of crew level regulation through the compulsory arbitration procedure, Congress meant for the Award to serve as a point of departure for the future collective bargaining of the parties, under the Railway Labor Act, for the years to come. The Award itself reflects this intent; in fact, some of the most critical provisions of the Award are wholly inconsistent with the notion that there might be preemption only during the two year period.

For example, under the job protection provisions applicable to firemen, the carriers must pay very substantial severance allowances to the employees whom they are free to separate and must pay relocation allowances to others to whom they are free to offer other positions. Plainly, provisions of this kind evidence an intent to provide for long range relief. It would be

an absurdity to hold that Congress intended the railroads, after they had paid millions of dollars in severance pay to employees, to rehire them after the two year period or to employ others in the jobs declared by the Award to be superfluous.

The intent of Congress was, then, as the Award evidenced, that the compulsory arbitration procedure was to give the parties a bench mark for their future collective bargaining. This intent would be totally frustrated if it were to be held that the effect of Public Law 88-108 and the Award was simply to effect a temporary suspension of the state laws relating to mandatory employment on the railroads. Once Congress has acted in this area and sanctioned a solution inconsistent with the state laws, the status quo was completely altered; it would be totally disruptive of peaceful labor relations to hold that upon the expiration of the Award the state laws would resume their effect.

CONCLUSION

For the reasons stated, this Motion to Affirm should be granted.

Respectfully submitted,

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APPENDIX I**The Commerce Clause**

United States Constitution, Article I, Section 8, Clause 3:

"The Congress shall have Power—

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

APPENDIX II**The National Transportation Policy**

The National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act [The Interstate Commerce Act], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act [The Interstate Commerce Act], shall be administered and enforced with a view to carrying out the above declaration of policy."

APPENDIX III**The Railway Labor Act**

Sections 2 and 5 through 10 of the Railway Labor Act of 1926, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151a, 152, 155-60:

"§ 2. GENERAL PURPOSES.

"The purposes of this Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.***"First. Duty of carriers and employees to settle disputes.***

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. Consideration of disputes by representatives.

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively,

by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Designation of representatives.

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to

assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. Agreements to join or not to join labor organizations forbidden.

"No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. Conference of representatives; time; place; private agreements.

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed

to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. Change in pay, rules, or working conditions contrary to agreement or to section six forbidden.

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Notices of manner of settlement of disputes; posting.

"Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the repre-

representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. Violations; prosecution and penalties.

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be

paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

"Eleventh. Union security agreements; check-off.

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United State, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such em-

ployees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 3 of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein

or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

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“§ 5. FUNCTIONS OF MEDIATION BOARD.

“*First. Disputes within jurisdiction of Mediation Board.*

“The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

“(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

“(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

“The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

“In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

“If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify

both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

“Second. Interpretation of agreement.

“In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

“Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents.

“The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

“(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so dis-

interested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

"If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

"(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

"(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

"(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to

such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

“(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

"§ 6. PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

"§ 7. ARBITRATION.

"First. Submission of controversy to arbitration.

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 1-6 of this Act such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

"Second. Manner of selecting board of arbitration.

"Such board of arbitration shall be chosen in the following manner:

"(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

"(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

"Third. Board of arbitration; organization; compensation; procedure.

"(a) Notice of selection or failure to select arbitrators.

"When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

"(b) Organization of board; procedure.

"The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

"(c) Duty to reconvene; questions considered.

"Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

"Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the

same district court clerk's office, as the original award and become a part thereof.

“(d) Competency of arbitrators.”

“No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

“(e) Compensation and expenses.”

“Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

“(f) Award disposition of original and copies.”

“The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Com-

merce Commission, under the Interstate Commerce Act, as amended.

“(g) Compensation of assistants to board of arbitration; expenses; quarters.

“A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

“Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

“(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.

“All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with

any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

"Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

"§ 8. AGREEMENT TO ARBITRATE; FORM AND CONTENTS; SIGNATURES AND ACKNOWLEDGMENT; REVOCATION.

"The agreement to arbitrate—

"(a) Shall be in writing;

"(b) Shall stipulate that the arbitration is had under the provisions of this Act;

"(c) Shall state whether the board of arbitration is to consist of three or of six members;

"(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

"(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

"(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitra-

tion may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

“(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

“(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

“(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

“(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

“(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

“(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

“(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for

a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

“(n) Shall provide that the respective parties to the award will each faithfully execute the same.

“The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

“§ 9. AWARD AND JUDGMENT THEREON; EFFECT OF ACT ON INDIVIDUAL EMPLOYEE.

“*First. Filing of award.*

“The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

“*Second. Conclusiveness of award; judgment.*

“An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the

award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

"Third. Impeachment of award; grounds.

"Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

"(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

"(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

"Fourth. Effect of partial invalidity of award.

"If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are

separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

"Fifth. Appeal; record.

"At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

"Sixth. Finality of decision of court of appeals.

"The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

"Seventh. Judgment where petitioner's contentions are sustained.

"If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

"Eighth. Duty of employee to render service without consent; right to quit.

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual

employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent.

“§ 10. EMERGENCY BOARD.

“If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

“There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

“After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.”

APPENDIX IV**Excerpts from the Award of the
National Arbitration Board No. 282**

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

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PART B—REDUCTIONS IN JOBS

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided, that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews; then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraph B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

* * * * *

III. CONSIST OF ROAD AND YARD CREWS (OTHER THAN ENGINE SERVICE)

PART A—BASIC PROVISIONS

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, in-

interpretation, or practice, which require a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

- (a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and
- (b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives or the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCEDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

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B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

- (a) Assurance of adequate safety.
- (b) Avoidance of unreasonable burden or workload on members of the crew.
- (c) Changes in operating conditions, including density of traffic.
- (d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
- (e) Special conditions which exist on any particular assignment.

- (f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
- (g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
- (h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
- (i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
- (j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
- (k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

- (a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.
- (b) The number of passenger cars handled in the train and passenger count.
- (c) The method of handling passenger transportation (tickets).
- (d) The number of passengers boarding and leaving the train at intermediate stations.
- (e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

- (a) The amount and nature of work to be performed en route.
- (b) The length of train, in context with the amount and nature of work to be performed en route.
- (c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

- (a) The amount and nature of the work to be performed.
- (b) Volume of work considered in context with applicable service time limitations.

• • • • •

IV. DURATION

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

APPENDIX V

**Excerpts from the Awards of the Local Boards of Adjustment
With Respect to Missouri Pacific Railroad Company and
The Texas & Pacific Railroad Company**

Missouri Pacific Railroad Company

(Northern, Central and Southern Districts)

BACKGROUND:

The award of Arbitration Board No. 282 provided that changes in the scope or application of rules, which require a stipulated number of trainmen in road service or brakemen in yard service, could only be accomplished by agreement or in accordance with procedures provided therein.

This Carrier gave notice thereunder on January 25, 1964 to the Organization of proposed changes in the number of brakemen or helpers to be used in several classes of road and yard service.

The Organization refused to meet or negotiate thereon because it considered such notice to be premature. Pursuant to the provisions of such award, this Board was established with the Organization Member and the Neutral Member having been appointed by the National Mediation Board.

When this Board convened on March 31, 1964 the Organization requested an indefinite recess and delay in its proceedings. That request was denied by a decision dated April 1, 1964. The neutral member then urged the parties to engage in the good faith bargaining, upon this crew consist issue, contemplated by the award of Board No. 282. The representatives of the Organization declined to do so and refused to participate further in the proceedings of this Board. Accordingly the following findings and award are based upon the evidence submitted by the Carrier.

FINDINGS:

1. Road Service

The award of Board No. 282 permits notice of proposals for change in the stipulated number of trainmen required to be used in any class of road service in the following categories:

- (a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and
- (b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen.

The Carrier's notice of January 25, 1964 proposed the following changes in the number of brakemen to be used in road service:

"All main line local freight trains now requiring three brakemen under the provisions of Article 38 of the Basic Schedule will be operated with two brakemen.

All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with one brakeman, except service on the Great Bend Branch shall not require the use of a brakeman.

All traveling switch engine service will be protected by one brakeman.

The following scheduled passenger trains and all extra passenger trains will not require the use of a brakeman-flagman:

Nos. 14 and 15,
Nos. 11 and 12 between Kansas City and Pueblo,
Nos. 1 and 2,
Nos. 34 and 35,
Nos. 31 and 32,
Nos. 37 and 38, and
Nos. 16 and 17 between Kansas City and Omaha."

Part III C(1) of the award is as follows:

"C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions."

Paragraph C(2) sets forth the general considerations, C(3) the particular considerations in passenger road service, C(4) the particular considerations in freight service, and C(5) the particular considerations in yard service. It

does not appear necessary to restate them here. Basically they all relate to safety of operation or workload.

(a) Main Line Local Freight Service.

Article 38 of the Trainmen's Schedule provides that "on all main line local freight, 'Dutch' local, and mixed trains, the crew shall consist of a conductor and three brakemen."

It appears that when this rule was first written in 1890 there was a large amount of LCL freight handled in way freight or peddler cars, and that it was the duty of the train crew to load and unload such freight at various stations along the line. Today no way freight or peddler cars are used and the work of loading and unloading them has been eliminated.

At that time, it also appears, many small industries used rail service, whereas now many of them use truck service, which has substantially reduced the switching required by local freight crews.

Other changes over the years are the installation of automatic block signals, CTC, automatic crossing signals and radio communication with and between trains. Operating officials of this Carrier consider flag protection of trains outmoded, in view of the improved systems of control and communication, and propose to change the operating rules to eliminate any requirement for flagging. When that work is eliminated, one less brakeman is necessary to accomplish the work and man all positions for work when the train is stopped.

Through freight trains operate over most of the territory served by these locals. They have a crew consisting of a conductor and two brakemen and perform some switching, set-out and pick-up of cars. This is cogent evidence that the locals can be operated safely with the crew consist proposed by the Carrier.

The presence or absence of a fireman in the engine service crew would not alter these findings, because it appears that on trains manned with a conductor and two brakemen, one of the brakemen rides in the locomotive when running over the road.

Under the circumstances shown, the proposal of the Carrier, with respect to main line local freight service crew requirements, is justified by the guidelines set forth in the award of Board No. 282.

(b) Branch Line Service.

Article 38, referred to in part 1(a) above, also provides that "on branch runs, where the service is light, the crews shall consist of a conductor and two brakemen, excepting that on branches where the trains are heavy enough to require it, three brakemen shall be employed at the discretion of the Superintendent."

This is a long standing recognition that train crews on branch line service can appropriately consist of one less brakeman than on main line service. It appears that generally there is no other service on the branch line, switching is light and uncomplicated, and the number of cars handled is less than on main lines. Changing the stipulation regarding crew consist would not alter the discretion of the Superintendent to assign more brakemen where the trains are heavy enough to require it.

All of the changes in work load and most of those concerning changes in control and communication equipment discussed in part 1(a) hereof are applicable here. There is obviously no necessity for flag protection when the train is the only one on the branch and, if the fireman is eliminated from the engine crew, safe operation can be assured by assigning the brakeman to ride in the locomotive while running over the road.

Under these circumstances the Carrier's proposal, to reduce the crew consist to one brakeman and a conductor, is justified by the guidelines in the award of Board No. 282.

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It appears that since 1910 when that consist rule was adopted there have been many changes in equipment affecting the work of yardmen. Cars are now equipped with hand power brakes, which make the setting of brakes much easier and quicker than the old stem-winding hand brake, and which necessitate setting brakes on fewer cars because the holding power is much greater.

In recent years automated electronic classification yards have been constructed in Kansas City and Little Rock. Utilization of these yards has reduced the necessity for classification work in other yards as trains now arrive with cars grouped for the various connections and industrial areas. Thus lead switching has been greatly reduced and yard work has become mostly pulls and shoves.

Engines are equipped with two-way radio, portable radio sets are available for ground crews to communicate with the engineer, and larger yards have been equipped with tele-talk equipment. Street and highway crossings within switching limits are generally protected by automatic signals.

It appears that these cumulative changes have reduced the efforts required of yardmen and enhanced the safety of yard operations. Even if we assume that firemen will be eliminated from yard engines, it is apparent that the proposal of the Carrier, to reduce the stipulated number of helpers used in all classes of yard service to one, is justified by the guidelines set forth in the award of Board No. 282.

The propriety of the remainder of the Carrier's proposal to operate specific yard assignments without a helper is not so obvious from the evidence adduced and must be

denied under those guidelines, except in the following situations.

It appears that at Leavenworth, Kansas, one yard engine is assigned five days per week to handle setouts and pick-ups by two trains and interchange with two other carriers. The work is so meager that only two or three cars are handled at a time and the time of the crew is largely waiting rather than working time. It could, apparently, be handled easily by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Falls City, Nebraska. It is not operated every day and, when operated, the switching required consumes no more than two hours. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Fort Scott, Kansas. It is operated only on those days when service is needed and rarely exceeds one hour of work on the days it is used. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

It appears that one yard assignment is maintained at Paragould, Arkansas. It is operated only three days per week and on those days rarely exceeds two hours of work. It is apparent that the work involved could easily be accomplished by a foreman without a helper during his regular tour of duty.

3. General Findings

It should be noted that, under Part III D of the Award of Board No. 282, no employee who was in train or yard service on January 25, 1964 will be separated from the service, unless and until retired, discharged for cause, or otherwise removed from the service of the Carrier by

natural attrition. In their opinion, the neutral members of that board said:

"The issues in this case involve an obvious distinction between questions concerning *jobs* and questions concerning *men*. Another distinction, however, is equally important: that between the question whether a job is unnecessary and the question whether and in what manner an unnecessary job should be eliminated. Neither the issues nor the Board's award can be understood unless these distinctions are kept in mind. In dealing with both the fireman and the crew consist issues we have established a procedure for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination. The sharpest and most stubborn disagreements have been over this procedure—over any question, indeed, that affected the number of jobs which might be declared 'blankable' within a given length of time. It is important to realize, however that *declaring a job 'blankable' under the terms of the Board's award does not necessarily result in the immediate elimination of that job or the layoff of its occupant*. The Board's award makes the actual elimination of jobs subject, in most cases, to attrition—to the vacating of jobs by the natural processes of retirement, transfer, voluntary quit, discharge, or death. The determination that a job is 'blankable' will usually mean, not that an employee will be laid off, but only that, when it becomes vacant, no new employee need be hired to fill it."

It should also be noted that the proposed changes in the stipulated number of brakemen or helpers required in each class of service are, like the prior rules and practices, stipulations of minimum crew consist. If on particular days or assignments more are needed to accomplish the work efficiently, the Carrier is free to assign a larger crew.

AWARD:

1. (a). All main line local freight trains will be operated with a minimum of two brakemen.
(b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
(c). The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
(d). The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.
2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service, except that no helper shall be required on the following yard assignments:

Leavenworth Yard
Falls City Yard
Fort Scott Yard
Paragould Yard.

Missouri Pacific Railroad Company
(Gulf District)

. . . .

AWARD:

1. (a). All main line local freight trains will be operated with a minimum of two brakemen.
 - (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c). The Carrier's proposal respecting traveling switch engine service is denied, except as such service is encompassed by part (b) above.
 - (d). The Carrier's proposal to operate specified passenger trains without the use of a brakeman-flagman is sustained.
2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service.

The Texas & Pacific Railroad Company

. . . .

AWARD:

1. (a). All main line local freight trains and dodgers will be operated with a minimum of two brakemen.
 - (b). All classes of road service, including all miscellaneous and unclassified service, on branch lines will be operated with a minimum of one brakeman.
 - (c). The Carrier's proposal respecting dodger service is denied, except as such service is encompassed by parts (a) and (b) above.
2. There shall be a minimum of one helper on any yard engine engaged in yard, transfer, belt line or miscellaneous yard service.

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AUG 18 1965

JOHN F. DAVIS, CLERK

In the
SUPREME COURT of the UNITED STATES

October Term, 1965

BROTHERHOOD OF LOCOMOTIVE
ENGINEERS, ET AL.,

v.

No. 69

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD CO., ET AL.,

HARDIN, ETC., ET AL.,

v.

No. 71

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD CO., ET AL.,

**Brief of State of Wisconsin
Amicus Curiae**

BRONSON C. LA FOLLETTE
Attorney General

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Assistant Attorney General

*Attorneys for State of Wisconsin
as amicus curiae*

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HARDIN, ETC., ET AL.,

v.

No. 71

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD CO., ET AL.,**

**Brief of State of Wisconsin
Amicus Curiae**

QUESTION PRESENTED

Did Congress intend by Public Law 88-108, which provided for arbitration of a specific labor dispute, to preempt regulation of train crews, so as to exclude all state legislation on the subject?

POSITION OF THE STATE OF WISCONSIN,
AMICUS CURIAE

The State of Wisconsin respectfully represents to the court that Congress did not, either by Public Law 88-108 or by any other legislation, preclude states from regulating railroad train crews so as to serve public safety as local conditions may require.

Such position has been affirmatively established by action of all three departments of Wisconsin's state government.

The legislative position was evidenced by enactment of secs. 192.25 (2), (4) and (4a), Wisconsin Statutes, which were amended by Ch. 299, Wisconsin Laws of 1959, to extend the full-crew laws to trains "propelled by any form of energy." The executive position was evidenced by approval of the law.

The position of the judicial branch was stated by Wisconsin's supreme court on June 1, 1965 in *Chicago & N. W. R. Co. v. La Follette*, 27 Wis. (2d) 505, 135 N. W. (2d) 269. The decision was responsive to challenges of the state law based, in part, on one of the decisions here under appeal, i.e., *Chicago, Rock Island & Pac. R. Co. v. Hardin*, 239 F. Supp. 1.

The Supreme Court of Wisconsin recognizes that state regulation of train crews must not infringe upon rights protected by the Fourteenth Amendment. Accordingly, the matter in which the above cited decision was given was remanded to a lower court for trial of other constitutional issues.

This brief is limited to the proposition that states have not been ousted by Congressional legislation of their traditional power to regulate train crews in the interest of public safety, when the state regulations do not otherwise violate constitutional rights.

ARGUMENT

I.

THE SUPREME COURT OF WISCONSIN ISSUED AN OPINION JUNE 1, 1965, THAT CONGRESS HAS NOT OUSTED STATES OF JURISDICTION TO REGULATE TRAIN CREWS

The Supreme Court of Wisconsin handed down its decision on June 1, 1965, in *Chicago & N. W. R. Co. v. La Follette*, 27 Wis. (2d) 505, 512-513, 516-520, 135 N. W. (2d) 269. The court's language best speaks for itself:

"* * * before pre-emption will be found to exist, that intention of Congress must be clearly manifested. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* (1924), 183 Wis. 47, 197 N. W. 352; *Florida Lime & Avocado Growers v. Paul* (1963), 373 U. S. 132, 83 Sup. Ct. 1210, 10 L. Ed. (2d) 248, rehearing denied 374 U. S. 858, 83 Sup. Ct. 1861, 10 L. Ed. (2d) 1082; *International Union v. Wisconsin Employment Relations Board* (1949), 336 U. S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651, rehearing denied 336 U. S. 970, 69 Sup. Ct. 935, 93 L. Ed. 1121; *Missouri Pacific R. Co. v. Norwood* (1931), 283 U. S. 249, 51 Sup. Ct. 458, 75 L. Ed. 1010; *Chicago, Rock Island & P. R. Co. v. Hardin*, *supra*; *New York Central R. Co. v. Lefkowitz*, *supra*. The ultimate question is: Does the application of state

law frustrate the purpose of the federal legislation? *Teamsters Union v. Morton* (1964), 377 U. S. 252, 84 Sup. Ct. 1253, 12 L. Ed. (2d) 280. See also *Teamsters Union v. Oliver* (1959), 358 U. S. 283, 79 Sup. Ct. 297, 3 L. Ed. (2d) 312.

"The clear manifestation of a purpose to pre-empt state legislation should be considered in light of the rule that the states have considerable latitude respecting safety regulation of interstate commerce in the exercise of their police powers. Thus, it was said in *Terminal Asso. v. Trainmen* (1943), 318 U. S. 1, 8, 63 Sup. Ct. 420, 87 L. Ed. 571:

"As to both classes of runs, the effect of the order is in some measure to retard and increase the cost of movements in interstate commerce. This is not to say, however, that the order is necessarily invalid. In the absence of controlling federal legislation this Court has sustained a wide variety of state regulations of railroad trains moving in interstate commerce having such effect.'"

* * *

[Here follows the text of the state law and of Public Law 88-108, 77 Stat. 132, 45 U. S. C. A. § 157 (Supp.)]

* * *

"For the reasons which follow, we conclude the state full-crew laws have not been pre-empted.

"The following appears in 109 Congressional Record 16122 (Aug. 28, 1963):

'Mr. Harris. This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the

labor brotherhoods, the employees' representatives, and the Secretary of Labor. It was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language:

'The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

'In a footnote on page 112 of the hearings before the committee on House Joint Resolution 565, the original bill, there is a discussion of the legal basis for State "full-crew" laws, and a citation to several Supreme Court decisions upholding these laws, such as *Missouri Pacific R. R. Co. v. Norwood* (283 U. S. 249).

'Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill.

'I think that is about as clear as we can make it.'

"The award of the arbitration board is as much a part of the law of the land as is the statute. The statute commands a study and award be made in respect to the fireman issue. That such a study and award were made does not *ipso facto* pre-empt state law. Note that the statute and the award expire by the terms of the statute.

"The award itself provides:

'II. Use of Firemen (Helpers) on Other Than Steam Power

'Part A—Saving Clause

'A (1) All agreements, rules, regulations, interpretations and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.'

"The award makes reference to the matter of safety. The matter of crew consist of trains and engines was left for local negotiation. Guidelines were set forth, one of which is, 'State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.' This guideline is not squarely on point but it does reflect appreciation of local safety rules.

"The opinion of the neutral members of the arbitration board states, at page 4:

'The provisions of our award are explained in general terms in this opinion, without reference to certain refinements spelled out in the award. In the event of any inadvertent conflict between the explanation given in this opinion and the precise language of the award, the latter is, of course, intended to govern.'

"The award is silent on the question of preemption of the full-crew laws. The opinion should be read as explanatory of the award.

"The opinion rejected the idea that there will be a wholesale elimination of personnel from the jobs which have been terminated. Several reasons were given. One is that the award provides for gradual elimination of the employees. And, further, '... a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service.'

"With respect to the crew-consist issue, the opinion states:

'It has been explained earlier in this opinion that the size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, *state full crew laws*, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions.' (Emphasis added.)

"The board was directed to pass directly on the firemen and train-crew issues. *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co.*, *supra*. It did not, however, pre-empt the field, as shown by the award and the opinion of the neutral members.

"There is a split of authority on the pre-emption question.

"In *Florida Lime & Avocado Growers v. Paul*, *supra*, it was said that if physical compliance with both the state and federal law is impossible, state law is pre-empted. Such is not the case here. In the *Florida Lime & Avocado Growers Case* the court stated the standards for determining when there is pre-emption. Does state law operate as an 'obstacle to the accom-

plishment and execution of the full purposes and objectives of Congress?" The court said at page 142:

"The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

"There is no pre-emption, as the court said:

'... in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'

"The well-established rule that states may regulate in this area of safety, the fact that Public Law 88-108 and the award do not clearly manifest an intention to occupy this field warrant the conclusion that our full-crew laws have not been pre-empted. Whether such laws can withstand the challenge from other directions—and the sufficiency of such a challenge—are the next points to be considered."

II.

CONGRESS HAS INDICATED NO INTENT TO SUPERSEDE THE DETERMINATIONS OF THE UNITED STATES SUPREME COURT THAT REGULATION OF TRAIN CREWS IS A PROPER FIELD FOR STATE ACTION

A. Federal Law Prior to Enactment of Public Law 88-108 Established That Regulation of Train Crews Was within the Power of States

The last of the three cases in which the United States Supreme Court expressly sustained the Arkansas full-crew laws against challenges involving the Commerce Clause of the Constitution was *Missouri Pacific R. Co. v. Norwood* (1931), 283 U. S. 249, 256, 75 L. ed. 1010, 51 S. Ct. 458. The court there indicated that no federal regulation enacted prior to 1931 had ousted states of jurisdiction. The court said:

"Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews. *Reid v. Colorado*, 187 U. S. 137, 148. *Savage v. Jones*, 225 U. S. 501, 533. *Napier v. Atlantic Coast Line*, 272 U. S. 605, 611. * * *" (loc. cit. 283 U. S. 256)

The ruling of the foregoing case was impliedly approved in 1945 in *Southern Pacific Co. v. Arizona* (1945), 325 U. S. 761, 782, 89 L. ed. 1915, 65 S. Ct. 1515, in which the full-crew laws were distinguished from the law there invalidated.

B. Legislative History of Public Law 88-108 Shows that Congress Did Not Intend to Oust States of Jurisdiction

The only Congressional action since the year 1931 which might be claimed to bring under federal control the subject of the composition of train crews is the resolution adopted by Congress in August 1963 known as Public Law 88-108, which was adopted for the purpose of preventing a nation-wide railroad strike.

The opinion of the two judges who concurred in the majority opinion in 239 F. Supp. 1, which is here on appeal, seems to have been influenced by what they believed the law *should* be rather than by indications of Congressional intent.

Where the words of a Congressional enactment do not of themselves preclude state action, this court has avoided reading such words into the enactment.

Where Congressional intent has been ascertainable from legislative history, this court has resorted to such history as it did, for example, in *Charles Bowd Box Co. v. Courtney* (1962), 368 U. S. 502, 7 L. ed. (2d) 483, 82 S. Ct. 519.

The committee report quoted in *Chicago & N. W. R. Co. v. La Follette*, 27 Wis. (2d) 505, 135 N. W. (2d) 269, furnishes affirmative proof of Congressional intent that states should retain their traditional authority to regulate train crews.

Further, in the hearings before the committee, the Secretary of Labor cited the decision of the Supreme Court of the United States in the latest of the Arkansas cases (*Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249) and said:

"The intention, Mr. Mcss, would be that the state railroad full crew laws would not be affected. * * * It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any state full crew law."

Hearings, page 78.

C. The Purpose of Public Law 88-108 Does Not Require That States Be Ousted of Regulatory Power

The Congressional enactment which is urged as ousting states of jurisdiction to regulate train crews was not concerned primarily with the question of safety, but with a temporary solution of a labor dispute. This aspect is discussed in the decision of the New York Supreme Court for Westchester County in *The New York Central Railroad Company v. Louis J. Lefkowitz* (1965), 259 N. Y. S. (2d) 76, 111-112, from which the following excerpts are taken:

"The parties to the dispute were free to settle it by their own agreement if they could, and the resulting conditions could be as good, or as bad, insofar as safety and working conditions were concerned as the parties should choose to make them. What Congress was concerned with was the settlement of a dispute in the interest of the national welfare, which the parties had been unable to settle by negotiation and agreement, and it seems clear that Congress did not intend to enter the crew consist field to any greater extent than was necessary to accomplish that purpose. The objectives were to be achieved, as stated in the preamble to the joint resolution, in a manner which 'preserves and prefers solutions reached through collective bargaining, * * *.' Presumably, for that purpose, and to encourage further bargaining to bring about a permanent solution of the problem, if possible, by agreement, the public law further provided that the relief to be obtained through arbitration should be effective for a limited time. The award was to continue in force for a period not to exceed two years, unless the parties should otherwise agree.

"That Congress did not contemplate that the full crew laws should be affected seems evident from the provisions of the statute. The fact that the dispute was to be settled by agreement, if possible, does not appear to be consistent with a purpose to supersede the state laws. It does not seem likely that Congress intended that laws enacted under the constitutionally protected police powers of the states might be set aside by agreement between the railroads and their employees. There is, of course, ample authority which establishes that collective bargaining agreements made pursuant to federal law bear 'the imprimatur of the federal law upon them,' and cannot be vitiated or made

illegal by state laws. (See *Railway Employees' Dept. v. Hanson*, 351 U. S. 225; *California v. Taylor*, 353 U. S. 553, *supra*; *Local 24 of the International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283.

"No case has been cited, or discovered, however, which applies that principle against state laws relating to minimum requirements of health or safety, nor do I believe that it may properly be so applied, in the absence of a clearly stated Congressional purpose to effect such a result. Indeed, in the *Oliver* case (358 U. S. 283, *supra*) in sustaining a collective bargaining agreement prescribing a wage scale for truck drivers, as against a state statute, the court said:

'We have not here a case of collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in in the world of commerce.' (p. 297) (See also *Missouri Pac. R. Co. v. Norwood*, 283 U. S. 249, *supra*.)

* * *

"In recommending the passage of the Joint Resolution, The Committee on Commerce, in the Senate, referred to the resolution as one designed to resolve the current dispute, and stated that it was not, and could not conceivably be considered as a precedent for any other labor management dispute. It was, the Committee stated, 'what it purports to be—a one shot solution through legislative means to a situation which imperiled, beyond question the economy and security of the entire nation.'"

III.

THE ENFORCEMENT OF STATE FULL-CREW
LAWS WILL SERVE THE NATIONAL INTEREST

If Congress had all the information it needed to enact uniform regulation throughout the nation, it would have enacted a statute making clear its intent to occupy the field and so to preclude states from legislating. Instead, it provided only for a *temporary* solution of the difference of the parties to the labor dispute. The arbitration award made pursuant to the Congressional enactment provided for establishment of a national joint board "with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period this award remains in effect."

Surely, when both Congress and the arbitration board recognized the need of further study, it must have been recognized that a permanent solution needed all the information which could be obtained under varying local conditions and varying regulations. What better source of information could exist than fifty states whose varying conditions of population, climate, terrain, and the like are being dealt with by the regulations which local officials have found to be best adapted to local needs?

Respectfully submitted,

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Office Supreme Court,
FILED

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No. 69
(Consolidated with No. 71)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHER-
HOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CON-
DUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF
NORTH AMERICA *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN
FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWEST-
ERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE APPELLANTS

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NO. 10
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No. 69
(Consolidated with No. 71)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHER-
HOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CON-
DUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF
NORTH AMERICA *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN
FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWEST-
ERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The majority and minority opinions of the District
Court for the Western District of Arkansas (R. 227-83) are
reported at 239 F. Supp. 1.

JURISDICTION

The judgment of the District Court was entered on March 8, 1965. R. 284-85. Notice of Appeal was filed on March 17, 1965. R. 287-89. A Jurisdictional Statement was filed on April 12, 1965. Probable jurisdiction was noted on June 7, 1965; the appeal was consolidated with No. 71, in which the Jurisdictional Statement had been filed on April 15, 1965. R. 296. The jurisdiction of the Supreme Court to review the decision on direct appeal is conferred by 28 U.S.C. § 1253.

STATUTES INVOLVED

ARK. STAT. ANN. §§ 73-720 through 722, 73-726 through 729 (Repl. Vol. 1957), and Public Law 88-108, 77 STAT. 132, 45 U.S.C. following § 157 (1964), are set forth as Appendix A and B hereto.

STATEMENT

The statutes challenged in this case were passed by the General Assembly of Arkansas to delineate minimum train crews for certain conditions of railroad operation in the state.

ARK. STAT. ANN. §§ 73-720 through 722 (1947) require a minimum crew of an engineer, a fireman, a conductor and three brakemen for freight trains, except for small companies and short trains. ARK. STAT. ANN. §§ 73-726 through 729 (1947) require a minimum crew of an engineer, a fireman, a foreman and three helpers for switch trains operating in large communities, except for small companies.

Six large interstate railroad companies brought this action before a three-judge court in the Western District of Arkansas on April 10, 1964. R. 1-24. Their complaint sought an injunction against enforcement of the statutes applicable to freight and switch crews, as violative of the Fourteenth Amendment and the commerce and supremacy clauses of the United States Constitution.

The complaint conceded that the Arkansas statutes have been upheld in the past against similar contentions, but alleged that changes in operating conditions and expanded federal occupation of the field make prior holdings inapposite. R. 6-14. The primary basis for the latter argument was the 1963 passage of Public Law 88-108, 77 STAT. 132, 45 U.S.C. following § 157 (1964). R. 19. Public Law 88-108, enacted to prevent disruption of essential national transportation services over a dispute which had not been susceptible of settlement through extant mediation procedures, established an arbitration procedure to resolve two specific issues involving work rules for certain railroads.

Intervention was granted to five operating brotherhoods, unions which represent several thousand employees of the plaintiff railroads in Arkansas. R. 24-27. The broth-

erhoods and the Attorney General of Arkansas denied all vital allegations of the complaint, and alleged that the challenged statutes protect the public safety in a manner within the power of the state to effectuate. R. 28-39. Discovery proceedings were suspended upon the filing by the railroads of a motion for summary judgment based upon supremacy clause, commerce clause and equal protection issues. R. 40-41. The supremacy clause contention was found sufficient, two of the three judges holding that the Arkansas statutes are "in substantial conflict with Public Law 88-108 . . . and the proceedings thereunder, and are therefore unenforceable." R. 278. The third judge dissented, relying on "prior specific findings in the earlier cases . . . and the favored position given by the Supreme Court to state safety statutes." R. 283. Judgment enjoined enforcement of the challenged measures. R. 284-85.

On March 27, 1965, Mr. Justice Byron R. White stayed the injunction pending disposition of the case by this Court. R. 294-95. Appeals were perfected by the brotherhoods and the State of Arkansas; they were consolidated on June 7, 1965, in an order noting probable jurisdiction. R. 296.

SUMMARY OF ARGUMENT

The Arkansas full crew statutes have been validated consistently as proper exercises of state power to protect the safety of its citizens.

This Court has upheld the Arkansas statutes in question against repeated railroad attacks based on varied constitutional contentions, including federal preemption. *E.g., Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931). The state legislation again was cited with approval in *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

After failing to repeal the full crew laws by initiated act in 1958, the railroads brought this action on substantially the same grounds as prior cases reaching this Court. Additional argument rests solely on the general expansion of the preemption doctrine and the passage by Congress of Public Law 88-108.

On the record at bar, the full crew laws should continue to be considered as safety statutes. As such, they are exercises of state power permitted by federal labor-management relations legislation. *Terminal R.R. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

Congress has not impaired the enforcement of the Arkansas full crew laws through Public Law 88-108 or any other legislation.

Judicial evaluation of a preemption contention requires examination of Congressional intent. The primary test is what Congress says, and subsidiary tests of supersession must be resorted to only when Congress does not say what it intends.

The effect of Public Law 88-108 on state full crew laws was considered exhaustively by Congress, and every authoritative expression negated preemption. To be absolutely

sure that no implications of the Interstate Commerce Act could be construed to result in preemption, Congress installed as arbitrators a limited *ad hoc* board, rather than the Interstate Commerce Commission recommended by the President. The members of Congress and the contending parties understood at the time that the federal legislation was not to affect full crew laws.

The arbitration board was faithful to the congressional intention. As to one of the issues before it, it pointed out that the apparent severity of its rulings would be ameliorated by the continued operation of state full crew laws. As to the other, it instructed subsidiary panels to be guided by state railroad legislation.

Even if inferential tests are examined, no suggestion of preemption can be found. The congressional resolution was drafted solely to stop a specific strike. Only two of many pending issues were covered. Only certain parties are affected. The resolution expired 180 days after its enactment, and the ensuing arbitration award two years after it became effective. Congress did not occupy the same field as that of the full crew laws; even if it did, the occupation does not produce a clash from which preemption can be inferred.

The Railway Labor Act and Interstate Commerce Act no more bar the operation of state full crew laws now than they did at the time of *Terminal R.R. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). The reasons for an asserted increase in preemption rulings in other labor relations fields do not apply here.

Invalidation of Arkansas full crew laws on preemption principles could result only from judicial evaluation of the merits of the work rules dispute, a constitutionally unjustifiable interference with the political and legislative process.

Even if the railroads are right about the economic undesirability of the full crew laws, recognition of such undesirability and response to the recognition are functions exclusive to the legislature and the people.

Public Law 88-108 arose out of contested political efforts by both sides to an old dispute. Congress was presented with all of the facts and arguments, and deliberately chose to act in a manner which would not interfere with state full crew laws. In doing so, it recognized legitimate values, such as the gradual, not abrupt, elimination of jobs as a result of industrial advances. The people of the states, including Arkansas, also recognize the ways in which competing interests may be served during the process of repeal.

Invalidation of the Arkansas full crew laws here would violate a concept of the judicial function which has been discarded in due process, separation of powers and political question fields. *E.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963). The judicial restraint urged here was exercised in another situation arising from technical progress of railroads in *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

The court below applied its ideas of economic policy in concluding that Congress *should* have preempted through Public Law 88-108. This, of course, is not the question. The legislative history leaves no question about what Congress *did*.

ARGUMENT

I. THE ARKANSAS FULL CREW STATUTES HAVE BEEN VALIDATED CONSISTENTLY AS PROPER EXERCISES OF STATE POWER TO PROTECT THE SAFETY OF ITS CITIZENS.

A.

The two full crew laws¹ in dispute comprise a small portion of Chapter 7 of Title 73 of the Arkansas Statutes, entitled "Equipment of Railroads—Safety Provisions." ARK. STAT. ANN. §§ 73-701 through 744 (Supp. 1963). Arkansas lawmakers have expressed in this chapter their views on a variety of conditions to protect the citizens of the state from the hazards of railroading.

The earliest and most-applied section of the chapter is an 1868 enactment requiring the sounding of a bell or whistle at public crossings. ARK. STAT. ANN. § 73-716 (Repl. Vol. 1957); *Kansas City S. Ry. v. Baker*, 233 Ark. 610, 346 S.W.2d 215 (1961). The statutes in dispute were passed in 1907 and 1913. The most recent addition to the chapter, enacted in 1953, requires sanitary drinking cups and pure ice cooled drinking water on locomotives and cabooses. ARK. STAT. ANN. §§ 73-741 through 744 (Supp. 1963). Other portions were changed as recently as 1961. ARK. STAT. ANN. § 73-734 (Repl. Vol. 1957), repealed by Ark. Acts 1961, No. 185. Safety requirements defined by the chapter include candle power of headlights, construction of cabooses, lights on switches, signals at tunnels and first aid kits.

¹Any characterization of these statutes risks reflection of partisan vigor intrinsic to a dispute which has raged for over a century. See Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49 (1962). Propriety of the term "full crew laws" has been established by the Arkansas Supreme Court. *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958). See also *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945). In any event, this selection seems preferable to others available, such as "excess crew laws" or "minimum safe crew laws."

Certainly legitimate safety protection may encompass the numbers and skills of employees who man the trains. The Arkansas railroad safety chapter incorporates this maxim in several particulars. In addition to the freight and switch crew standards challenged in the instant case, a companion law establishes a minimum crew for passenger trains.²

An organic relationship between the full crew statutes and other safety provisions has been generated by Arkansas lawmakers; an effect of wrenching two from the body of railroad safety law would be mutilation. See, *e.g.*, ARK. STAT. ANN. § 73-701 (Repl. Vol. 1957) (locomotive cab must be constructed to place engineer and fireman under same roof, which must be at most fourteen feet in length and extend over the entire engine gangway). Doctrines of civil liability have been painstakingly founded on the whole structure of the statutory chapter.³ See *Harper v. Missouri Pac. R.R.*, 229 Ark. 348, 314 S.W.2d 696 (1958); Note, 15 ARK. L. REV. 212, 213 (1961).

B.

From their inception, Arkansas full crew laws have been under persistent attack by railroads to which they apply. Shortly after the passage of the full freight crew act in 1907, a multifarious challenge to its constitutionality reached this Court. *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453 (1911). The statute does not, it was held, unconstitutionally regulate commerce, establish irrelevant classifications or deprive the railroads of property without

²The omission of this statute from the attack in this case suggests an eye to public relations, not logic. Cf. *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958).

³And compare statutes outside of the railroad safety chapter, such as that establishing a duty to keep a proper lookout. ARK. STAT. ANN. § 73-1002 (Supp. 1963); *Overstreet v. Missouri Pac. R.R.*, 195 F.Supp. 542 (W.D.Ark. 1961) (personal injury judgment for defendant based on satisfaction of lookout duty established by testimony of members of full crew).

due process of law. Although "Congress, in its discretion, may take entire charge of the whole subject of . . . interstate cars," until it does, state full crew laws prevail. 219 U.S. at 466. "It is not too much to say that the state was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits." 219 U.S. at 465.

Undaunted, the railroads launched substantially the same attack on the 1913 Arkansas full switch crew statute. *St. Louis, I.M. & S. Ry. v. Arkansas*, 240 U.S. 518 (1916). Again, and more summarily, this Court rejected their constitutional contentions and upheld the legislation.

It was fifteen years before the next invalidation effort. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931). The railroads contended, as they do in the instant case, that changed operating conditions and new congressional action gave substance to their due process, equal protection, commerce and supremacy clause contentions. Particularly on the preemption point, the railroads argued that following the two previous cases:

Congress has occupied the field and has delegated to the [Interstate Commerce] Commission and [Railway] Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with §§ 1(10) and (21), 13, 15 and 15a thereof . . . and with the spirit of the Railway Labor Act of 1926. 283 U.S. at 252-53.

In language that is central to the legislative development of the instant dispute, the Court held: "In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion

of the police power of the states for the regulation of the number of men to be employed in such crews." 283 U.S. at 256. *Norwood* was returned to this Court on an amended complaint in 1933; the same result was undisturbed. *Missouri Pac. R.R. v. Norwood*, 290 U.S. 600 (1933).

The Arkansas full crew law decisions were cited with approval in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945); the next phase of the railroad campaign featured a different tactic. In 1958, an act to repeal the three Arkansas full crew laws was initiated for popular vote. *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958). The people were no more persuaded by railroad entreaties than had been the legislature and the judiciary; Arkansas voters retained full crews by a margin of 162,748 to 130,465. Initiated Act No. 1 of 1958, Election Files, Arkansas Secretary of State (Nov. 3, 1958).

Now the half-century campaign of the railroads to nullify Arkansas full crew laws again reaches this Court. Evidentiary evaluation of their newest allegations of changed conditions was found unnecessary in the court below, as two judges were convinced that as a matter of law Congress has now so occupied the field as to prevent the operation of the state enactments.

C.

The legislative and judicial history of the Arkansas full crew laws indicates only that they are legitimate exercises of state power to protect the safety⁴ of its citizens. A safety characterization is not essential to the position of the brotherhoods. See *Kelly v. Washington*, 302 U.S. 1,

⁴"The essence of our suggested procedure is that 'safety' and 'hardship' are merely words except as they take on meaning in actual situations. Safety and hardship are related to time and place; and we know of no way to abstract them from time and place." *Report of Emergency Board No. 434* (May 13, 1963), *Hearings on H.J. Res. 565 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess. [hereinafter *House Hearings*], 46.

13 (1937). But it is a context of substance, as in the words of the dissenting judge below, this Court has given a "favored position" to "state safety statutes." *Terminal R.R. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943): *Local 24 v. Oliver*, 358 U.S. 283, 297 (1959).

Every significant judicial consideration of full crew laws, including every reference by this Court, has recognized their safety rationale.⁵ The Supreme Court of Arkansas described the statutes as "directly affecting the public safety" as recently as 1955. *Chicago, R.I. & Pac. R.R. v. State*, 224 Ark. 622, 627, 275 S.W. 2d 646, 649 (1955). See *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 433 (1935) ("When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight."). A recent New York decision, based on weeks of testimony on the intricacies of contemporary railroading, described many dangers to which the safety requisites in dispute rationally may be addressed. *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S. 2d 76 (Sup.Ct. 1965). See also *Chicago & N.W. Ry. v. La Follette*, 135 N.W. 2d 269, 278 (Wis. 1965).

Against this judicial backdrop, the indisputable original purpose of full crew laws,⁶ and the refusal of the court

⁵The railroads argue that the arbitration board established by Public Law 88-108 determined conclusively that safety factors do not warrant a crew of the size specified by state full crew statutes. Motion to Affirm, 16-17. Assuming, *arguendo*, such determination by the arbitrators based upon a preponderance of the evidence before them, it cannot be the basis for a judicial assumption that a state legislature acted unwisely any more than any other source of an opinion about the "wisdom, need, or appropriateness of the legislation." See *Ferguson v. Skrupa*, 372 U.S. 726 (1963). As to the argument that Congress thereby "entered the field" of railroad safety, see Point II, *infra*.

⁶*Work Rules Controversy in Perspective*, 87 MON. LAB. REV. III (Mar. 1964). There is ample ground for concluding that safety continues to be affected by the makeup of train crews. See, e.g., *Hearings on S.J. Res. 102 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess. [hereinafter *Senate Hearings*], 492-96, 631-34; *House Hearings*, 711-14, 997-99. The Chairman of the Interstate Commerce Commission pointed out that even railroad

below to take testimony on their relevance to current conditions, the alleged intention of Congress to impair state protection of the safety of its citizens must be evaluated. See *Munn v. Illinois*, 94 U.S. 113, 132 (1877).

managers cannot agree among themselves on the crew complement conducive to safe operation. *House Hearings*, 840-41. See also *Statement M-450*, Interstate Commerce Commission, April and August, 1964, which indicates that train accidents and employee casualties increased with the reduction of employment permitted under some circumstances by the arbitration board established pursuant to Public Law 88-108.

II. CONGRESS HAS NOT IMPAIRED THE ENFORCEMENT OF THE ARKANSAS FULL CREW LAWS THROUGH PUBLIC LAW 88-108 OR ANY OTHER LEGISLATION.

A.

Public Law 88-108, the primary basis of a preemption contention in this case, grew out of a dispute over work rules between certain railroads and brotherhoods. The matter could not be resolved through extant mediation procedures,⁷ and the parties were left to economic self-help. *Brotherhood of Locomotive Engineers v. Baltimore & O. R.R.*, 372 U.S. 284 (1963).

Because of the judgment of the executive and legislative branches that a widespread railroad strike could not be tolerated in the national interest, Congress enacted Public Law 88-108 to meet "a need for a special, ad hoc legislative remedy to fit the situation confronting the United States because of the hopeless deadlock in the railroad negotiations." 109 CONG. REC. 15979 (1963). See also 109 CONG. REC. 15890, 16120 (1963); S. REP. No. 459, 88th Cong., 1st Sess. [hereinafter S. REP.], 7 (1963); H.R. REP. No. 713, 88th Cong., 1st Sess. [hereinafter H.R. REP.], 13 (1963).

Obviously Congress has the power to exercise exclusive control over the field occupied by the Arkansas full crew laws, whether it be characterized as railroad safety or employment practices.

There is no longer any question that Congress can redefine the areas of local and national pre-

⁷It seems pointless to supplement the countless reviews of the history of the dispute. A concise survey is contained in the *Report to the President on the Railroad Rules Dispute* by a special subcommittee of the President's Advisory Committee on Labor-Management Policy (July 19, 1963). R. 54-58. See also Kaufman, *The Railroad Labor Dispute: A Manethon of Maneuver and Improvisation*, 18 IND. & LAB. REL. REV. 196 (1965).

dominance . . . despite theoretical inconsistency with the rationale of the Commerce Clause . . . as a limitation in its own right. The words of the Clause—a grant of power—admit of no other result. When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition

California v. Zook, 336 U.S. 725, 728 (1949). Congress is not compelled to occupy a whole field; judicial treatment of a supersession contention requires measurement of the occupation. *Kelly v. Washington*, 302 U.S. 1, 10 (1933); *Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

The best test of what Congress intended is what Congress said. Most cases—the hard cases—in which preemption has been an issue have required intensive inference because Congress has failed to say if it intended its exercise of power to be exclusive. Compare *Gibbons v. Ogden*, 9 Wheat. 1 (1824), with *City of New York v. Miln*, 11 Pet. 102 (1837); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), with *Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

The volume of opinion in cases in which congressional intent was difficult to ascertain must not obfuscate the first principle of preemption: subsidiary “tests of supersession” are material only when Congress has not specifically expressed itself. *Pennsylvania v. Nelson*, 350 U.S. 497, 501-02 (1956). A search for pervasiveness or repugnancy is necessary when “the statute says nothing expressly on this point and we are aided by no legislative history directly in point.” *California v. Zook*, 336 U.S. 725, 733 (1949).⁸

⁸Recent development of the preemption doctrine by the judiciary has been especially notable in the application of the National Labor Relations Act and its amendments. 29 U.S.C. §§ 141-87 (1964). Because Congress refrained from saying how much it left to the states, the courts have been forced to evaluate “conflicting indications of congressional will.” *Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953). The problem has been com-

Only when Congress does not say what it intends, a presumption that it acted reasonably shows intent to preempt when concurrent state action would be unreasonable.

B.

The intention of Congress in the enactment of Public Law 88-108 was direct and express.

The potential effect of Public Law 88-108 on the enforcement of state full crew laws was considered exhaustively in House and Senate committee hearings and on the House floor. Every federal official to address himself to the subject expressed the intention and understanding that the enactment should not or would not affect state full crew regulations. Representative samples⁹ include the following unmistakable sentiments:

SECRETARY WIRTZ.¹⁰ The intention, Mr. Moss, would be that State railroad full crew laws would not be affected. I am obviously not in a position to foreclose any question of interpretation which might arise but our investigation has gone to the extent of consideration of whatever case law might seem to bear most directly on that and wanting to observe the propriety of not foreclosing any question on that. I call attention to such state-

pounded by the occasional necessity to rely upon "what went on in the mind of an imaginary average congressman deliberating on a question that no one actually considered." Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1348 (1954). The contrast with Public Law 88-108 was noted by Representative Halleck: "We are up against a different proposition here today." 109 CONG. REC. 16138 (1963). Even full flowering of NLRA preemption has not barred the State of Arkansas from preserving safety on its public highways. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

⁹Because of its impact and consistency, a verbatim transcript of every reference to state full crew laws in the legislative history of Public Law 88-108 is reproduced as Appendix C to this brief.

¹⁰The Secretary of Labor presented and interpreted the administration proposal.

ments as those of the *Missouri Railroad Company v. Norwood*, the Supreme Court case in 1930 in which the Court said, "In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent the assertion of the police power of the States for the regulation of the number of men to be employed in such crews." It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law.

Hearings on H.J. Res. 565 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. [hereinafter *House Hearings*], 78.

The committee does not intend that any award made under this section [Section 3] may supersede or modify any State law relating to the manning of trains.

H.R. REP., 14.

Senator THURMOND. I believe that there are about 17 States that have laws establishing minimum crews for the manning of trains. Is that the correct number, around that?

Mr. WALRATH [Chairman, Interstate Commerce Commission]. I have heard that; I believe it is true.

Senator THURMOND. These laws are based upon the rights of the States to regulate industry in setting up minimum safety standards for the public as well as the employees, especially to protect the public. I wonder, in your opinion, what effect, if any, would a ruling by the ICC in regard to the crew-consist problems have upon these States hav-

ing laws establishing minimum crews in the manning of trains. In other words, would your rulings preempt the various State laws on this matter?

MR. WALRATH. Senator Thurmond, I want my general counsel to correct me if I am wrong. Let me put it this way: I heard that question asked of the Secretary of Labor in the House only yesterday. He said that it had been researched by his legal staff. I am not aware that we have researched it recently. But his opinion was that the passage of this or any rules that we approve would not affect the operation of State laws.

Hearings on S.J. Res. 102 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. [hereinafter Senate Hearings], 400.

MR. SISK [Representative from California]. Mr. Speaker, I requested this time to ask a question of the chairman of the Committee on Interstate and Foreign Commerce regarding the provisions of State laws having to do with the full crew laws that are in existence, I understand, in some 17 States, including the State of California. May I ask this question of the chairman of the committee: Is it his understanding that nothing in this joint resolution is to any way preempt on behalf of the Federal Government the field affecting State full crew laws? If he may make a comment on this, I would appreciate it.

. . . .

MR. HARRIS. This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the labor brotherhoods, the employees' representatives, and the Secretary of Labor. It

was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language:

The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

In a footnote on page 112 of the hearings before the committee on House Joint Resolution 565, the original bill, there is a discussion of the legal basis for State "full crew" laws, and a citation to several Supreme Court decisions upholding these laws, such as *Missouri Pacific R.R. Co. v. Norwood* (283 U.S. 249). Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill. I think that is about as clear as we can make it.

Mr. SISK. Mr. Speaker, I appreciate the statement of the distinguished chairman of the Committee on Interstate and Foreign Commerce. Then certainly as I would understand it, of course, it would be the intent of the Congress that we are not preempting the field in which State have legislated in this area.

109 CONG. REC. 16122 (1963).

Two items are cited by the railroads in rebuttal to the massive congressional rejection of preemption during

consideration of Public Law 88-108. Motion to Affirm, 18-20. One is the response of Representative Smith of Virginia to the declaration of Chairman Harris quoted above. 109 CONG. REC. 16122 (1963). Perhaps at first blush some confusion is created by Mr. Smith's reluctance "to remain silent." But the essence of his statement, that states cannot affect interstate commerce because of the commerce clause of the federal Constitution, paraphrases a theory so discredited as to be totally immaterial. "Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 336 U.S. 725, 731 (1949).

The brotherhoods can agree that the other element of legislative history cited by the railroads is highly persuasive. But its consequences only emphasize stated congressional intention not to preempt.

The railroads point out that the general counsel of the Interstate Commerce Commission informed committees of both houses that if they wished to make "doubly" or "absolutely certain" that state full crew laws would continue in effect, they might do so by exempting application to this work rules arbitration of an Interstate Commerce Act provision which might be construed to allow supersession.¹¹ *House Hearings*, 614; *Senate Hearings*, 401; Motion to Affirm, 19-20.

Congress responded to this advice—by taking all reference to the Interstate Commerce Act out of the resolution.

The original recommendations of President Kennedy would have awarded jurisdiction over the entire dispute

¹¹The court below reasons that if Congress did not intend to preempt, it would have included such instructions in the statute itself. R. 266. The converse is more consistent with the weight of authority. *E.g.*, *California v. Zook*, 336 U.S. 725, 733 (1949); *Parker v. Brown*, 317 U.S. 341, 351 (1943); *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940).

to the Interstate Commerce Commission. R. 53-54. When the full crew law issue was raised, the committees received several presentiments of danger to their intention to preserve the state enactments, arising primarily out of Section 5(11) of the Interstate Commerce Act.¹² The warning of a brotherhood witness was explicit:

Mr. SCHOENE [General Counsel, Railway Labor (union) Executives' Association]. I certainly visualize that as a bare minimum the carriers will contend that the effect [of] orders of the Commission authorizing decreases in crew consist—either of enginecrew or traincrew—would operate to overrule full crew laws in those States that have them. Perhaps that explains the alacrity with them which the carriers embraced the President's recommendation and endorsed it. . . . Perhaps this is the main thing they are looking to, to supersede the laws of the States. But I have no notion whether it stops there. This language is much more extensive. [Quotation from Section 5(11) of Interstate Commerce Act.] I have no notion [what] health and safety laws of the States may be claimed to be superseded by order of the Interstate Commerce Commission. . . . This a completely uncharted but highly dangerous field.

¹²"The authority conferred by this section shall be exclusive and plenary, and any carrier . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved and provided for. . . ." 49 U.S.C. § 5(11) (1964). There was substantial (but now academic) question as to whether the reference to "the procedures and provisions of section 5 of the Interstate Commerce Act" contained in Section 1 of the Presidential proposal included the power to preempt; a legal memorandum on the point was prepared at the request of the Chairman of the House Committee. *House Hearings*, 111-13.

Senate Hearings, 629.

The warnings were heeded. Both committees reported out bills which dropped reference to the Interstate Commerce Act altogether. S. REP., 8-9; H.R. REP., 5. Senator Morse made a determined effort on the Senate floor to return administration of the dispute settlement procedure to the I.C.C., but his proposal was defeated overwhelmingly. 109 CONG. REC. 15950-52 (1963). See also 109 CONG. REC. 15967 (1963).

Rejection of the ICC, with its preemption possibilities, was expressly at the behest of the railroad brotherhoods. 109 CONG. REC. 16126 (1963); S. REP., 9. Committee decisions on the issue were virtually unanimous. 109 CONG. REC. 15902, 16129 (1963). Congress did not merely *say* it did not want to preempt; it *acted* to discard any procedure which would be subject to any inference of preemption.

The claim of the railroads in this case is especially contrived since their own leaders were participants in the process of preemption rejection during the congressional hearings. "This record is convincing that there was general understanding between both the supporters and the opponents" of Public Law 88-108 that it would not affect state full crew laws. See *Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30, 39 (1957).

Mr. STAGGERS [Representative from West Virginia]. Would this supersede any of the State laws with respect to full crews and so forth?

Mr. WOLFE [Chairman, National Railway Labor (management) Conference]. As we understand it, and this understanding is largely the result of our hearing what Secretary Wirtz testified to yesterday, it would not preempt any State full crew laws.

House Hearings, 562.

Mr. MOSS [Representative from California]. In other words, you are not seeking here, nor does the resolution, any elements of compulsion other than purely interim compulsion while the mechanics of bargaining continue?

Mr. WOLFE. I so understand the resolution.

Mr. MOSS. Then this question of full crew laws must of necessity be continued subject to the laws of the States and no preemption expressed in the resolution we take, because if it were we would be granting a right beyond that which would have been achieved by any collective bargaining procedure?

Mr. WOLFE. I don't know, you may be getting beyond my field.

Mr. MOSS. I do not think so, Mr. Wolfe. I believe you are a most knowledgeable individual.

Mr. WOLFE. Thank you, sir.

Mr. MOSS. And a most competent one. You cannot at the moment conceive of any method whereby you could affect the full crew laws of the 17 States by collective bargaining procedures.

Mr. WOLFE. I agree to that. We cannot negotiate the elimination of a statute no matter how intolerable or unjustified it may be.

House Hearings, 570. See also *House Hearings*, 537. The testimony of brotherhood witnesses indicated an understanding that Congress did not wish to displace full crew laws, but a fear of railroad manipulation of Interstate Commerce Act procedures into a preemption theory. *House Hearings*, 837-38; *Senate Hearings*, 478, 629.

Perhaps the most telling railroad admission that Congress did not intend to foreclose enforcement of the state laws was submitted in calculated written form, subject to none of the infirmities of oral response under pressure. *Senate Hearings*, 707-22. The official railroad position scornfully dismissed fears of the brotherhoods about loss of employment. The railroads did not, they maintained, urge passage of the resolution to "put all of these men out on the street." The "facts," asserted the railroads, are these:

A study made by the carriers indicates that 25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the states of [listing 13 states, including Arkansas], and that approximately 50 percent of the redundant positions occupied by unneeded trainmen and switchmen are protected by the laws of these States and those of [listing 3 states]. In these States, even when redundant employees are removed from the working lists through natural attrition, new unneeded employees must be hired to fill their positions.

Senate Hearings, 707.

To dramatize the point, the railroads submitted a table showing that 17,870 positions out of the 51,500 that might be eliminated under an arbitration award were "protected by State laws." *Senate Hearings*, 708. See also Shils, *Industrial Unrest in the Nation's Rail Industry*, 15 *LAB. L. J.* 81, 109 (1964).

In the face of these admissions designed to encourage passage of the resolution, initiation of this case gives substance to brotherhood fears about "highly dangerous"

expansion of railroad contentions. See *Senate Hearings*, 629.

C.

In accordance with final instructions of Congress in the text of Public Law 88-108, Arbitration Board No. 282 was established, took testimony and issued an award. R. 80-174. See *Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964), *affmd.*, 331 F.2d 1020 (D.C.Cir. 1964), *cert. den.*, 377 U.S. 918 (1964).

Whether the award is considered to be congressional action, or merely administrative interpretation of such action, the Board was true to the intent not to interfere with continued enforcement of state full crew laws.

Preliminarily, neutral members of the Board noted:

We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement. There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview. R. 97.

Within this narrow jurisdiction, the Board observed three policy considerations: adequate and safe transportation service, interests of affected carriers and employees, and fidelity to the areas of disagreement narrowed by prior negotiation and mediation.¹³

¹³One of the earlier mediation efforts was undertaken by a Presidential Railroad Commission appointed in 1960 by President Eisenhower.

The first of the two substantive issues assigned by Congress to the Board, the "use of firemen (helpers) on other than steam power," was resolved by the Board itself. R. 82-89. The second, "consist of road and yard crews," was referred with instructions to local special boards because "the consist of crews necessary to assure safety and to prevent undue work loads must be determined primarily by local conditions." R. 89-95. See also, *e.g.*, R. 176-202; *Brotherhood of Railroad Trainmen v. Chicago, M., St.P. & Pac. R.R.*, 345 F.2d 985 (D.C.Cir. 1965).

In addition to its disclaimer of authority over "questions of general social policy, community action, or legislation which bear on the problems before" it, the Board was responsive specifically to congressional intention to preserve state full crew laws.

Following its conclusions on the reduction of jobs, the Board addressed itself to the "equities of dismissed persons," pointing out:

On its face this [job elimination] procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it will not have

See R. 75. Subsequent mediation bodies made "relatively liberal" recommendations, including more gradual reduction of jobs and increased assistance to affected employees. R. 125-28. The Report of the Presidential Railroad Commission was attached as exhibit 2 to the motion for summary judgment filed by the railroads in this case. The brotherhoods excluded this document from the designation of record to be printed in No. 69, although the State agreed to its inclusion in No. 71. The brotherhoods contend, in agreement with the Chairman of the House Committee on Interstate and Foreign Commerce, that this document is irrelevant to the federal legislative action. *House Hearings*, 986. Specifically, the Commission went beyond the issues raised by the parties at the inception of the dispute, and made gratuitous and expansive proposals to "inaugurate an era of change, [although] realizing that all these reforms cannot be accomplished at once." *House Hearings*, 905; *Senate Hearings*, 236; Arnow, *Findings of the Presidential Railroad Commission*, 14 LAB. L. J. 677, 680 (1963).

such an effect is due to three reasons. First, it will be necessary to provide jobs for firemen whose rights to continue employment are guaranteed by the terms of the award. . . . Second, *a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service.* Finally, [the parties have agreed to retain firemen under certain circumstances]. R. 121. (Emphasis added.)

To be certain that special boards dealing with the crew consist issue on a local basis continued application of congressional intent, the Board directed such tribunals to be "governed," *inter alia*, by "State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections." R. 93.

Thus the argument advanced by the railroads in urging Congress to pass an arbitration resolution—that state full crew laws would reduce the burdensome effect of an award on employees—came to fruition.¹⁴

This careful forbearance in the exercise of federal authority is classic recognition of the power of Congress to enter a field with precisely the abstention it deems advisable. *California v. Zook*, 336 U.S. 725, 728 (1949). The federal government may refer to, and thereby virtually adopt, state action to indicate benchmarks for the metes

¹⁴The railroad members of the arbitration panel were "disappointed" with provisions of the award which protected employees and "which preclude the elimination of many redundant positions in train crews," but they did not suggest that the Board exceeded congressional directives in its recognition of the continued efficacy of state full crew laws. R. 138-40. In April, 1965, the chief negotiator for the railroads reported on the effect of the award in eliminating jobs of firemen, and added a prediction that repeal of full crew laws by the states would permit a further cutback in the future. *Report on Elimination of Rail Firemen's Jobs*, 58 L.R.R.M. 53 (1965).

and bounds of the particular exercise of federal power."¹⁵ *Gibbons v. Ogden*, 9 Wheat. 1, 207 (1824); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

D.

The railroads are not aided by subsidiary tests of supersession even if the expression of congressional intention not to preempt state full crew laws is ignored. *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S.2d 76 (Sup. Ct. 1965); *Chicago & N.W. Ry. v. La Follette*, 135 N.W.2d 269 (Wis. 1965).

Most certainly Public Law 88-108 is not pervasive. "It would be difficult to find a [statute] in which the intention of Congress to circumscribe its regulation and to occupy a field limited by definite description is more clearly manifested." *Kelly v. Washington*, 302 U.S. 1, 13-14 (1937). See *Reid v. Colorado*, 187 U.S. 137 (1902).

The President recommended that Congress refer to the Interstate Commerce Commission all the issues which were specified at the initiation of the current work rules dispute. R. 48-49. After intense consideration, Congress limited jurisdiction of an *ad hoc* arbitration panel to the use of firemen on other than steam power and the consist of road and yard crews. R. 76-77. See 109 CONG. REC. 15952-62 (1963); S. REP., 9, 12; H.R. REP., 5. Remaining issues, such as the manning of self-propelled vehicles, inter-divisional runs, the combination of road and yard work, wage and fringe benefits, and the training of engine service

¹⁵As the railroads persist in contending that Congress occupied the same area as that of state full crew laws, it is arguable that this very lawsuit seeks violation of the commands of Public Law 88-108. Section 1 provides that "no carrier which served the notices of November 2, 1959 . . . shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided. . . ." R. 76. Since the brotherhoods have not agreed to elimination of the state crew requirements, and the arbitration opinion expressly deferred to them, this action seeks authority to make a change which has been barred by the terms of the joint resolution.

employees, were remanded by Congress to the parties for continued negotiation.¹⁶ See *Senate Hearings*, 17-19; *House Hearings*, 706-11.

Not only were the issues limited. Public Law 88-108 is confined to prescribed parties. 109 CONG. REC. 16130 (1963). It was observed repeatedly in Congress that the Southern Railway System, operating in fourteen states, was not involved. *Senate Hearings*, 369, 572; *House Hearings*, 561, 813-14. See also *Division 700 v. National Ry. Lab. Arb. Bd.*, 224 F.Supp. 366 (D.D.C. 1963) (Union R.R. excluded). Several Class I railroads unsuccessfully requested coverage by the congressional action. See *Senate Hearings*, 706-07; *House Hearings*, 1025-26. Omission of major segments of the industry is in substantial contrast with other railroad legislation. *E.g.*, Federal Safety Appliance Act, 49 U.S.C. §§ 1, 26 (1964).

A most persuasive negation of pervasiveness is the temporal limitation of the federal action. The resolution expired 180 days after its enactment, and the award will expire ^{in early 1964} on November 24, 1965. R. 95. See *Brotherhood of Railroad Trainmen v. Boston & M. R.R.*, 59 L.R.R.M. 2797, n. 1 (D.Mass. 1965). This limitation was not casual; from the message of the President to final passage, legislative history is marked by preoccupation with the interim nature of the remedy.¹⁷ *E.g.*, *Senate Hearings*, 8, 11, 49, 80-81, 364,

¹⁶This confidence in the collective bargaining process was not misplaced. On April 22, 1964, President Johnson announced a negotiated agreement of the parties on these issues. Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115, 128 (1964).

¹⁷In the face of this preoccupation, a conclusion that the Arkansas full crew laws are preempted not only for the duration of the arbitration award but permanently collides resoundingly with the requirement that congressional intent be measured carefully. Primal principles of judicial abstention make such a conclusion, unnecessary for resolution of the issues presented by the pleadings, gratuitous dictum. The brotherhoods decline to mount a major defense to this argument, both because of its immateriality and because Congress did not intend to preempt for any period. If

427; *House Hearings*, 50-51, 115, 552, 569.

A second subsidiary test of preemption invokes a mystique about "occupation of the field." Such intrusion is difficult to visualize in view of the overwhelming reluctance of Congress to act at all.

[T]here is not a person in this Senate, Democrat or Republican, or in the House, who wants to take a bite at this issue.

Senate Hearings, 460.

If we are going to resort to this kind of a bill, I want to make sure that it is just as temporary and just as limited as possible. . . .

Senate Hearings, 397.

There was, I must confess, an overriding reluctance for Congress to enter into this dispute, and there was sometimes a too optimistic remaining hope that something would happen and we would not be required to act.¹⁸

109 CONG. REC. 15892 (1963). See also *Senate Hearings*, 517-18.

[A]s we are venturing into a very seriously dangerous field in terms of American freedom, at least we can try to do it with the minimum impact. . . .

the issue should be reached by the Court, the intent of Congress to limit the effect of its action demands reversal of this conclusion by the court below. See also *In re Rahrer*, 140 U.S. 545, 565 (1891); *Amalgamated Assn. of Street Ry. Employees v. Wisconsin Employment Rel. Bd.*, 340 U.S. 416 (1951).

¹⁸Under the aegis of individuals and groups of congressional and administration officials, determined but unsuccessful efforts were made up until final passage of the resolution to resolve the dispute by negotiation between the parties. *Senate Hearings*, 76, 474-78, 517, 678; *House Hearings*, 544, 663, 775, 944-45; 109 CONG. REC. 15891, 15900 (1963).

109 CONG. REC. 15960 (1963).

The reluctance was translated into rigidly abstentionous action. Congress was faced with a specific threat, a railroad strike, and acted only to avert that threat. See *Senate Hearings*, 417-25, 703-05; *House Hearings*, 953-72; S. REP., 7; H.R. REP., 13.

My suggestion is that you have not accomplished anything with this legislation except one single thing, and that is you have put off a strike.¹⁹

House Hearings, 56.

There were other possible courses, any of which would have demonstrated pervasive purpose in excess of Public Law 88-108. Congress could have established mediation or permanent compulsory arbitration of the entire work rules dispute, federal seizure of the railroads or the substance of work rules themselves. This last possibility, with prior congressional precedent, was mentioned repeatedly, but rejected soundly. 109 CONG. REC. 15969-71, 16134 (1963); *Senate Hearings*, 460; *House Hearings*, 73, 96, 544. Compare *Wilson v. New*, 243 U.S. 332 (1917); *Senate Hearings*, 77-79.

An assumption that federal and state power are being exercised in the same "field" does not of itself invalidate the state action. *Colorado Anti-Discrimination Commn. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). There is no actual or potential conflict or impossibility of compliance with both enactments. As in *Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132 (1963), a remarkably analogous case on this point, the fact that state protection of the public may be more stringent than federal "demonstrates no inevitable collision between the two schemes of regula-

¹⁹Public Law 88-108 was also described as "strictly a procedural matter," and "what the parties had already basically agreed upon," "incorporated in legislative form." *Senate Hearings*, 370; S. REP., 9.

tion." 373 U.S. at 143. What Congress intended, here as there, was to invite contending parties to get together under the auspices of a federal agency and relieve a temporary problem. This is not conflict compelling preemption. See also *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939).

E.

Finally, the railroads assert, the Railway Labor Act and the Interstate Commerce Act, "even apart from" Public Law 88-108, displace Arkansas full crew laws.²⁰ R. 40-41; Motion to Affirm, 13-14, n. 7.

These contentions have been answered with such authority that no more than summary response seems necessary. As for the Railway Labor Act, the landmark decision is as reasonable now as it was in 1943, well after statutory amendments with any pertinence to the issues at bar.²¹

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental

²⁰The railroads also have announced a plan to dispute the conclusion of all three judges below that there are genuine issues of material fact which bar summary disposition of their commerce clause contentions. Motion to Affirm, 14. After express approval of the Arkansas full crew laws in a commerce clause case, *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945), substance to this plan is illusory. At the very least, remand for submission of evidence seems mandatory. *Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132, 136-37 (1963).

²¹In spite of many congressional proposals for amending the Railway Labor Act, changes have been few. Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49, 54 (1962); Shils, *Industrial Unrest in the Nation's Rail Industry*, 15 LAB. L. J. 81 (1964). The 1934 amendments, 48 STAT. 1185 (1934), added a procedure for formalizing the collective bargaining agency and an arbitration panel for settlement of grievances or "minor disputes." Since 1934 the only changes have been to extend coverage of most of the Act to the airline industry, 49 STAT. 1189 (1936), and to permit union security arrangements. 64 STAT. 1238 (1951). There were suggestions during hearings on Public Law 88-108 that the whole field of railway labor law may need revision some time in the future. E.g., *House Hearings*, 115-16.

regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed in those Acts is not primarily in working condition as such. . . . The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. . . . [W]e would be hardly expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation.

Terminal R.R. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6-7 (1943). Railway Labor Act interdiction of direct state interference with labor-management relations has been found, but not of "local health or safety regulation." *California v. Taylor*, 353 U.S. 553 (1957); *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956). See *Local 24 v. Oliver*, 358 U.S. 283, 297 (1959).

The national transportation policy, a preamble to the Interstate Commerce Act, is of no assistance to the railroad contentions here. 49 U.S.C. preceding § 1 (1964). Even its generalities require comity with the states. It is invoked regularly by railroad attorneys, but repeatedly found insufficient to modify specific congressional intent. *E.g.*, *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960); *Atchison, T. & S.F. Ry. v. Railroad Commn.*, 283 U.S. 380 (1931); *Lehigh Valley R.R. v. Board of Utility Commnrs.*, 278 U.S. 24 (1928).

General congressional policy implications are unnecessary for the issue at bar. Congress has not set forth "a clearly expressed purpose" to preempt since *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931), in which both Railway Labor and Interstate Commerce Acts were urged as superseding full crew laws. The central holding of *Norwood* was considered by Congress during the processing of Public Law 88-108, and still no such expression issued. To the contrary, Congress made any implications of the national transportation policy of the Interstate Commerce Act flatly immaterial by expunging its interrelation with Public Law 88-108.

The particular intention of Congress to preserve full crew laws in the passage of the work rules arbitration resolution cannot be controlled by general implications of other enactments, even assuming that earlier cases which reject preemption are no longer viable as authority. See Motion to Affirm, 13-14, n. 7.

III. INVALIDATION OF ARKANSAS FULL CREW LAWS ON PRE-EMPTION PRINCIPLES COULD RESULT ONLY FROM JUDICIAL EVALUATION OF THE MERITS OF THE WORK RULES DISPUTE, A CONSTITUTIONALLY UNJUSTIFIABLE INTERFERENCE WITH THE POLITICAL AND LEGISLATIVE PROCESS.

A.

The decision of the court below menaces a process fundamental to democracy.

The railroads argue that full crew laws have become "unneeded" and "obsolete." *E.g.*, Motion to Affirm, 15, n. 9. Assuming this economic and social development may have taken place, its recognition *and* the nature of the response to its recognition are valuable aspects of a process of lawmaking assigned by the Constitution to the legislatures and the people. Confiscation of this process by the judiciary is the most genuine "preemption" in the decision below.

It is relevant to recall that the [statute under consideration] was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against [a general aspect of labor-management relations] as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to

declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted.

Local 1976 v. N.L.R.B., 357 U.S. 93, 99-100 (1958).

This application of the judicial function "truism" by Mr. Justice Frankfurter is remarkably germane to the instant case. What Congress enacted in Public Law 88-108 is clear; a general policy of avoiding anything other than an immediate strike threat, and a specific policy of preserving state full crew laws dominate its legislative history and are apparent in its text.

There have been few conflicts in American economic and political history to equal the struggle between the railroads and railroad brotherhoods over work rules. Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49 (1962). Congress and the people it represents had the benefit of vigorous presentation of deeply held views from both sides in striking the balance that became Public Law 88-108.

The railroads announced that "railroad featherbedding" costs "everybody" \$500,000,000 a year, more than the San Francisco earthquake of 1906, the Chicago fire of 1871, or the Texas City disaster of 1947. *House Hearings*, 866-68. State full crew laws, the Senate was informed, require "unneeded" and "redundant" employees. *Senate Hearings*, 707. "Featherbedding," it was proclaimed, increases accidents, as demonstrated by casualty rates in the states which have "excess crew" "featherbed" laws.²²

²²"I have even read newspaper accounts of remarks of railroad officials bragging that the 'featherbedding' campaign was the basis for the decision of the Presidential Railroad Commission and even the Supreme Court decision in this case. I am sure such is not the case, but I am just as sure that the antagonism generated by that word put this problem in our laps." 109 CONG. REC. 16130 (1963).

House Hearings, 869. "No nation," warned newspaper advertisements signed by "American Railroads," "however rich, can afford such a crushing burden of totally unnecessary waste year after year." *House Hearings*, 870.

The process of political persuasion is not unknown to the brotherhoods.²³ "I have seen lobbies," said Senator Morse, "but I have never seen the kind of political lobby in operation that I have seen in recent days in the precincts of Congress on the part of the railroad brotherhoods." 109 CONG. REC. 15961 (1963). Perhaps applicable to both sides was the observation of Senator Simpson about the delay in final passage of the resolution. "One reason may be the political maneuvering that has been evidenced in an attempt to win political favor by some Members of this body." 109 CONG. REC. 15939 (1963). See Kaufman, *The Railroad Labor Dispute: A Marathon of Maneuver and Improvisation*, 18 IND. & LAB. REL. REV. 196 (1965).

This is not to suggest that attempts to persuade the American public and Congress are nefarious to any degree. To the contrary, Congress is the constitutional repository of the popular will, recognized as such from James Madison to George Meany.

The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.

²³For a plaintive railroad complaint about the political effectiveness of the brotherhoods, see Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 VA. L. REV. 196, 249-50 (1962).

The Federalist No. 49, THE FEDERALIST 338, 341-42 (Cooke ed. 1961).

When you say "more intelligently," yes; not to say that the people in the ICC are not intelligent but that Members of Congress have closer contact to this sort of thing than do the people of the ICC. The Members of Congress meet people. They are constantly dealing with people, and not dealing with the questions that come before the ICC. And this is a problem of people.

Senate Hearings, 600 (George Meany, President of the AFL-CIO, explaining the opposition of the labor movement to submission of the work rules dispute to the Interstate Commerce Commission).

Congress accepted the issue as a "problem of people." There are more execrable horrors to the American people than "featherbedding" and dearer values than "making the trains run on time." The severe limitations of Public Law 88-108 reflected, for example, an historic fear of compulsory arbitration.²⁴ *E.g.*, *Senate Hearings*, 11, 574-78.

It might be assumed, *arguendo*, that state full crew laws are anachronistic rules unresponsive to contemporary railroading.²⁵ The President proffered the issue as part of

²⁴This sentiment is not unknown to this Court. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923). "Each intervention of the government tends to discourage, and often to inhibit, genuine collective bargaining; if there is much likelihood that government will intervene, the party that thinks it may profit thereby will act so as to bring that intervention about, with the result that meaningful collective bargaining will tend to disappear from vital segments of the economy." Seidman, *National Emergency Strike Legislation*, SYMPOSIUM ON LABOR RELATIONS LAW 473, 474 (Slovenko ed. 1961).

²⁵This is not, it should be emphasized, actually conceded by the brotherhoods. See footnote 5, *supra*. The railroads state a cause of action, of course, by alleging that changes in operating conditions create due process infirmities in the state enactments. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931); *Chicago & N.W. Ry. v. La Follette*, 135 N.W.2d 269

a larger problem of automation. R. 50-52. The most lauded treatment of such problem includes a gradual reduction of jobs—but a more gradual reduction of the human beings that perform the jobs.²⁶ The number of railroad employees has dropped drastically in recent decades (and undoubtedly will continue to drop), but the passage of time can ameliorate “the unpleasant prospect of human obsolescence.” See R. 51.

This gradualism is a value of substance which Congress was entitled to recognize, and did recognize by allowing states to continue their own limitation on the impact of obsolescence. The railroads will respond that Arbitration Board 282 considered the problem of decreasing employment. But Congress established a mandatory minimum to such recognition, limiting the power of the Board by preserving the employee protection that state full crew laws afford.

State laws are not immutable. As the railroads pointed out repeatedly to the lower court, full crew legislation is being eliminated by normal political processes as the railroads are able to convince the people that they are undesirable. Several such enactments have been repealed since the passage of Public Law 88-108.²⁷ *E.g.*, MISS. CODE ANN. §§ 7759-61 (1942) (repealed by the state legislature on March 5, 1964); DEERING'S CALIF. LABOR C.A. §§ 6901-10 (Repl. Vol. 1964) (repealed by popular referendum in November,

(Wis. 1965). On remand this allegation will be tested by the crucible of trial, which it consistently has failed to survive. *E.g.*, *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S.2d 76 (Sup. Ct. 1965).

²⁶See, *e.g.*, Pollera, *Automation and Retraining: The Steelworkers-Kaiser Steel Experience*, N.Y.U. SIXTEENTH ANN. CONF. ON LABOR 73 (1963).

²⁷An interesting state action which also recognizes the ameliorative value of deferring reduction of railroad employment is the repeal of the Oregon train crew law, signed by Governor Hatfield on June 2, 1965, but not effective until 1967. *Chronology of Recent Labor Events*, 88 MON. LAB. REV. 867 (1965).

1964).²⁸ An easy initiative procedure is available to the railroads in Arkansas if they are unable to persuade the legislature about their position. ARK. CONST., Amdmt. No. 7; *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958). This is the path which the Constitution, Congress and this Court leave clearly accessible.

B.

Judicial abstention from economic and political policy decisions has classic forbears.

It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

The Federalist No. 78, THE FEDERALIST 521, 526 (Cooke ed. 1961).

The precept which the brotherhoods urge for preemption evaluation has been the essence of analogous constitutional consideration by this Court. It has been couched in terms of separation of powers, or restraint on political questions. *Marbury v. Madison*, 1 Cr. 137 [at page] 64

²⁸An American Bar Association report described the California repeal as action which "made the award of Federal Arbitration Board No. 282 applicable in California." *Report of the Committee on State Labor Legislation*, Section of Labor Relations Law, A.B.A., 25 (August, 1965; mimeographed).

(1803); *Mississippi v. Johnson*, 4 Wall. 475 (1867); *Baker v. Carr*, 369 U.S. 186, 217 (1962). It bars advertence to the "wisdom, need, or appropriateness" of state legislation under due process challenge. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *Truax v. Corrigan*, 257 U.S. 312, 357 (1921) (Mr. Justice Brandeis, dissenting: "What, at any particular time, is the paramount public need, is necessarily largely a matter of judgment.").

There are even factually similar cases which exemplify judicial abstention. Railway labor legislation has been characterized by congressional restraint. Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49, 54, 69 (1962); Siegel & Lawton, *Stalemate in "Major" Disputes under the Railway Labor Act—The President and Congress*, 32 GEO. WASH. L. REV. 8 (1963). Correlative restraint was exercised by this Court to effectuate that policy in *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). On another phase of the broad problem of technological change, the railroads argued, there as here, about economic stresses and inferences of the Railway Labor and Interstate Commerce Acts.

"These arguments," the Court pointed out, "are addressed to the wrong forum." 362 U.S. at 342. To paraphrase *Telegraphers*, if the scope of state authority to pass full crew laws is to be cut down to prevent "waste" by the railroads, Congress should be the body to do so. "Such action is beyond the judicial province," concluded Mr. Justice Black, "and we decline to take it." 362 U.S. at 342.

The court below may have acted from "orderly" economics and laudable patriotism.²⁹ Perhaps Congress should

²⁹E.g.: "Not the least of the court's consideration is the substantial public interest involved relative to the uninterrupted and orderly flow of goods in interstate commerce as well as the necessity for an efficient and orderly railway transportation system as a part of the national defense effort." R. 273. (Emphasis added.)

have preempted to establish "an efficient and orderly transportation system." But "the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword. Invalidation here would mean denial of power to Congress as well as to the . . . States." *International Bro. of Teamsters v. Hanke*, 339 U.S. 470, 478 (1950).

Judicial invalidation of state statutes which Congress intended to preserve, whether through elaborate manipulation of the secondary tests of supersession or simple conviction about the merits of the subject matter, is unjustified arrogation of both state and federal legislative processes.

CONCLUSION

The brotherhoods respectfully ask the Court to reverse the District Court for the Western District of Arkansas on the preemption issue, and remand the case for further proceedings on the remaining allegations of the complaint.

Respectfully submitted,

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APPENDIX A

ARK. STAT. ANN. §§ 73-720 through 722 (Repl. Vol. 1957)
(Ark. Acts 1907, No. 116)

73-720. Crew required on freight trains. No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

73-721. Exceptions from Act—Purpose. This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

73-722. Penalty for violations—Exceptions. Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

ARK. STAT. ANN. §§ 73-726 through 729 (Repl. Vol. 1957)
(Ark. Acts 1913, No. 67)

73-726. Switch crews in cities—Requisite members. No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one (1) engineer, a fireman, a foreman and three (3) helpers.

73-727. Purpose of act—Number in crew may be increased. It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one (1) engineer, a fireman, a foreman and three (3) helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this Act.

73-728. Application of act to cities of first and second class—Exception. The provisions of this Act shall only apply to cities of first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred (100) miles in length.

73-729. Penalty for violation of act. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars (\$50.00), and each crew so illegally operated shall constitute a separate offense.

APPENDIX B

Public Law 88-108

77 STAT. 132

88th Congress, S.J. Res. 102

August 28, 1963

Joint Resolution

To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railroad Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition

of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestion; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional

members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of \$100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in mak-

ing its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such

issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforceable through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX C

Reference to State Full Crew Laws
in Legislative History of Public Law 88-108
July 23 through August 28, 1963

I. HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

Hearings on H.J. Res. 565 (Railroad Work Rules Dispute),
Committee on Interstate and Foreign Commerce, House of
Representatives, 88th Cong., 1st Sess. (July 24 through
August 2, 1963)

At 78:

Mr. Moss [Representative from California]. Mr. Secretary, out in my State we have had, I believe since 1913, with amendments as recent as the past 2 years, a full crew law; what is the intended effect of an order issued in the event of enactment of this resolution by the ICC on those laws of some 17 States specifying requirements for railroad crews?

Secretary WIRTZ [Secretary of Labor]. This matter has been one of consideration in connection with the preparation of this proposal. The intention, Mr. Moss, would be that the State railroad full crew laws would not be affected. I am obviously not in a position to foreclose any question of interpretation which might arise but our investigation has gone to the extent of consideration of whatever case law might seem to bear most directly on that and wanting to observe the propriety of not foreclosing any question on that. I call attention to such statements as those of the *Missouri Railroad Company v. Norwood*, the Supreme Court case in 1930 in which the Court said, "In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent the assertion of the police power of the States for the regulation of the number of men to be employed in such crews." It would be the inten-

tion reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law.

Mr. MOSS. Thank you.

The CHAIRMAN [Representative Harris from Arkansas]. I don't want to overlook that because I want to talk about it a little later on, Mr. Secretary.

At 111-13:

Mr. SIBAL [Representative from Connecticut]. Mr. Secretary, you may have gone into this, and if you have, I apologize both because of the time of day and the long period you have given us, but we were out of the room, many of us, at different times, and I would like to touch on this point:

Do I understand that it is your position that this bill would not supersede the States full-crew laws?

Secretary WIRTZ. Yes, sir.

Mr. SIBAL. And has a thorough job of legal research been done on this?

Secretary WIRTZ. I indicated in my answer to a similar question earlier that the answer to the question of whether there is thorough research, the answer is "No."

Mr. SIBAL. So it is possible that there may be aspects of this which we had better look into?

Secretary WIRTZ. I would not be entitled to foreclose the judgment of the committee on that, but that is our clear view of the intention here.

The CHAIRMAN. I asked about that myself, Mr. Secretary. Is there anything in the Interstate Commerce Act which gives recognition to full-crew laws of the various States?

Secretary WIRTZ. I would want to answer subject to check, but I think not.

The CHAIRMAN. It is my impression that there is not, but the courts have upheld full-crew laws in the various States.

Secretary WIRTZ. That is correct.

The CHAIRMAN. That being true, I wish that you, if your counsel is with you, would point out to me anywhere in this resolution in which this would not supersede the full-crew laws or any other matters involved with work rules as contained in these notices.

Secretary WIRTZ. I think to the best of our knowledge, there would not be anything specifically that had that result.

The CHAIRMAN. I agree with Mr. Sibal, then, that research would be necessary, because it would seem to me the logical conclusion is that this gives the Interstate Commerce Commission authority to supersede these laws.

Secretary WIRTZ. I would respect your views, sir, completely on it.

The CHAIRMAN. I would respect yours, too, but I would like for us all to look into it.

Secretary WIRTZ. I think we should supply for the record the fullest possible exploration of that point.

(The following information was submitted for the record:)

EFFECT OF AN ORDER ISSUED BY THE ICC UNDER
SENATE JOINT RESOLUTION 102 (RE RAILROAD WORK
RULES DISPUTE) ON STATE "FULL-CREW" LAWS
THE PROBLEM

Section 1 of the proposed joint resolution provides that work-rules changes "*involving the manning of train or engine crews and the protection of the interests of employees affected thereby*" shall become effective upon application to and approval or modification by the ICC "*in accordance with the procedures [and provisions] of section 5*"¹ of the Interstate Commerce Act.

Section 5(11) of the Interstate Commerce Commission Act provides that—

"The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, *insofar as may be necessary to enable them to carry into effect [sic] the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . . [Italic added.]*

¹As introduced, this provision of the joint resolution also included the words "and provisions." For purposes of this memorandum, it will be assumed that section 5 is adopted for procedural purposes only. However, even if it were not, and the term "and provisions" remained in the resolution, the memorandum's conclusion, it is believed, would still be valid. House Joint Resolution 565 is identical with Senate Joint Resolution 102: "To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees."

The question presented is whether an order issued by the ICC determining the question of "crew consists," pursuant to section 1 of the joint resolution would, under the Federal "preemption" [sic] doctrine, require the invalidation of State "full-crew" laws² which conflict with the ICC order, particularly in light of section 5(11) of the Interstate Commerce Act.

THE CONCLUSION

Section 5(11) of the Interstate Commerce Act and pertinent court decisions, support the conclusion that an ICC determination under section 1 would not automatically invalidate State full crew laws, but that instead such invalidation would take place only to the extent that the ICC order so required. Section 5(11) would thus appear to authorize the ICC to approve an interim work rule subject to the condition that it would not be applicable in any State where the law required otherwise. This conclusion appears valid whether or not a joint resolution is considered to adopt section 5 of the Interstate Commerce Act for procedural purposes only.

ANALYSIS

Section 1 of the joint resolution authorizes certain work rules changes which shall become effective on approval or modification by the ICC "in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act."

²State "full-crew" laws impose minimum crew requirements on trains operating within the State. Typically, they require an engineer, fireman, conductor and brakeman on each train.

There are at least two arguments which can be advanced for the proposition that State "full-crew" laws would not be automatically preempted.³

The first is that in incorporating section 5 of Interstate Commerce Act reference, the joint resolution merely adopts the procedural provisions of the section and not the substantive provisions.

This view is supported by the fact that the Congress found it necessary, in section 3 of the joint resolution to provide that the "Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected as provided in section 5(2)(f)" of the Interstate Commerce Act.

If the substantive authority, as well as the procedural requirements of the Interstate Commerce Act were encompassed in the joint resolu-

³The Federal Constitution confers upon the Federal Government the exclusive power to regulate interstate and foreign commerce (art. 1, sec. 8, clause 3). The Supreme Court has, in a long line of decisions, held, however, that until Congress legislates on a subject relating to interstate commerce, the States have the power to establish such reasonable regulations as are appropriate for the health, lives, and safety of their citizens. The fact that interstate commerce is materially affected by the State's action does not in itself render the action invalid. So long as the State's regulation does not unduly obstruct or burden the flow of interstate commerce, its action in an area not regulated by Federal law is considered proper.

The enactment of State "full-crews" laws has been held to come within this category of lawful State activity. In a series of cases between 1911 and 1930, the U.S. Supreme Court has upheld the constitutionality of the State "full-crew" laws, ruling that they are not a deprivation of property without due process of law or an undue burden on interstate commerce. (*St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas*, 240 U.S. 518 (1916); *Chicago, Rock Island & Pacific Ry. Co. v. Arkansas*, 219 U.S. 453 (1911); and *Missouri Pacific R.R. Co. v. Norwood*, 283 U.S. 249 (1930)).

tion there would appear to be no need to refer to section 5(2)(f) or any other provision in section 5.⁴

Secondly, it appears reasonable to conclude that Congress, in enacting section 5(11) of the Interstate Commerce Act, had no intention of foreclosing the possible operation of State law, even where the ICC had acted.

If Congress has intended that Section 5(11) would preempt any State law it would simply have provided that the authority conferred by the section was "exclusive and plenary" without qualification.⁵

On the contrary, the section provides that carriers shall be relieved from the operation of State law only "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission." Obviously, if it was intended that the Federal law, or any action taken by the ICC pursuant thereto, was to preempt State law, there was no need to insert the quoted language.

⁴On the other hand, it should be noted that section 1 of the joint resolution refers to "the procedures and provisions of section 5." To interpret the resolution as incorporating only the procedures of section 5 ignores the words "and provisions" and is contrary to the well-settled rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute. Sutherland, *Statutes and Statutory Construction* § 4705 (2d ed. 1943).

⁵In rejecting the argument in the *Norwood* case, *supra*, that Congress had preempted this field from [sic] State regulation by the enactment of the Interstate Commerce Act, the Court stated:

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews."

Since Congress did insert this language in section 5(11) it can only be construed as a desire that ICC orders issued pursuant to section 5 would not preempt State laws automatically. Only "insofar as may be necessary to enable them [the carriers] to carry into effect the transaction so approved or provided for in accordance with the terms and considerations imposed by the Commission" would such a result obtain.

Thus, the Supreme Court has held that section 5(11) "reposes power in the Commission to exempt railroads * * * from State laws which bar them from operating in the State or impose conditions upon such operation" (*Seaboard Air Line Railroad Co. v. Daniel*, 333 U.S. 118 (1948)).

The CHAIRMAN. I think it is true, and I have discussed this with some of our own staff, that if guidance is given or some direction to the Interstate Commerce Commission, it could so recognize the various State laws.

Secretary WIRTZ. My understanding is that that is correct, Mr. Chairman.

At 536-37:

The CHAIRMAN. You say in freight trains there is an engineer, a fireman, and what kind of brakeman?

Mr. WOLFE [Chairman, National Railway Labor (management) Conference]. The forward brakeman or head brakeman, a member of the train crew.

The CHAIRMAN. In States with full crew laws what is the situation?

Mr. WOLFE. In some States there are more than a conductor and two brakemen as required by statute. This

extra brakeman, the third man, could be in the cab of the diesel or he could be in the caboose.

The CHAIRMAN. In other words, then, to carry out to the full extent the question of Mr. Friedel, in some instances at times you have the engineer, the fireman, and two brakemen in the cab of the engine?

Mr. WOLFE. That is quite possible where there is a full crew requirement or an excess crew requirement.

Mr. FRIEDEL. In the States that have that law, would there be any changes in the States laws as far as full crews are concerned under your agreement?

Mr. WOLFE. I think Mr. Wirtz indicated yesterday that that was not the intention of this resolution.

At 562:

Mr. STAGGERS [Representative from West Virginia]. I was interested about the case in California. Would this supersede any of the State laws with respect to full crews and so forth?

Mr. WOLFE. As we understand it, and this understanding is largely the result of our hearing what Secretary Wirtz testified to yesterday, it would not preempt any State full crew laws.

The CHAIRMAN. Would the gentleman yield at that point?

Mr. STAGGERS. Surely.

The CHAIRMAN. In your negotiations and bargaining with the employees your proposals and the counterproposals, at any time was it ever discussed as to whether or not the full crew laws of the various States would be interfered with or superseded or attempted to be modified?

Mr. WOLFE. In our discussions, Mr. Chairman, we did discuss the comments made by the Presidential Commission respecting the statutes that now exist in about 17 States. Pardon me just one second, if you please. The Commission touched on this very briefly, and if I may, Mr. Chairman, I would like to read it into the record.

The CHAIRMAN. Identify what commission you are talking about.

Mr. WOLFE. It is the Presidential Railroad Commission and it appears at page 63 of the Commission's report.

It is obvious, of course, that the ability of the carriers, whether acting unilaterally or otherwise, to affect changes in crew consists will be limited by applicable State crew consist laws or regulations as long as such laws or regulations continue to exist. As noted above, most of the legislation of this kind was enacted prior to 1920. These laws apparently failed to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize there will be difficulty in applying the rule recommended by us in States where full crew laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge.

During the time we were negotiating with the assistance of the Secretary of Labor and the Assistant Secretary of Labor, a settlement of the crew consist issue, and we suggested that the parties agree to jointly seek the passage of legislation which would eliminate and repeal all existing State full-crew laws and crew administrative regulations.

The CHAIRMAN. Was that agreed to?

Mr. WOLFE. It was not; no, sir. But it sounded like a very sound proposition.

At 569-70:

Mr. Moss [Representative from California]. Now if that is the case then by the action of this committee we should not seek to confer any degree of finality upon anything achieved as the result of the actions of this committee. That is to continue to be within the scope of collective bargaining; is that correct?

In other words, you are not seeking here, nor does the resolution, any elements of compulsion other than purely interim compulsion while the mechanics of bargaining continue?

Mr. WOLFE. I so understand the resolution.

Mr. Moss. Then this question of full crew laws must of necessity be continued subject to the laws of the States and no preemption expressed in the resolution we take, because if it were we would be granting a right beyond that which would have been achieved by any collective bargaining procedure?

Mr. WOLFE. I don't know, you may be getting beyond my field.

Mr. Moss. I do not think so, Mr. Wolfe. I believe you are a most knowledgeable individual.

Mr. WOLFE. Thank you, sir.

Mr. Moss. And a most competent one. You cannot at the moment conceive of any method whereby you could affect the full crew laws of the 17 States by collective bargaining procedures.

Mr. WOLFE. I agree to that. We cannot negotiate the elimination of a statute irrespective of how intolerable or unjustified it may be.

Mr. Moss. That is right. It is true that some of these statutes have not been dormant as far as any further action

or consideration of them is concerned for the period back in the 1920's as the Presidential Commission report would indicate.

I believe in the case of California that the most recent change of these laws, the full crew laws occurred either in 1962 or 1961 and dealt specifically with one of the issues most basic to the differences of the railroad workers and railroad management.

Mr. WOLFE. I am not familiar with that but I think Mr. Loomis is.

Mr. MOSS. I believe Mr. Loomis is. There was the deletion of the word "steam" and the substitution of the term "diesel."

Mr. LOOMIS [President, Association of American Railroads]. As I understand it, there was written into the act the existing provisions of the agreement between the firemen's organization and the carriers with respect to the manning of diesel locomotives.

I think the language, if I recall correctly, is almost identical, with the language in the collective bargaining agreement.

Mr. MOSS. I am correct, am I not, that this was either in 1962 or 1961?

Mr. LOOMIS. It was recently, at least.

Mr. MOSS. So it has been a matter considered by the legislature of that State within very recent times?

Mr. LOOMIS. I would say certainly within 4 years.

Mr. MOSS. I am not passing at this moment any judgment on the wisdom of the action of the legislature.

Mr. LOOMIS. I understand.

Mr. Moss. But I am trying to bring into perspective [sic] the questions before this committee and what is actually sought and what appears to be sought here is, one, a means to continue operation while the normal processes of collective bargaining work to bring about that finality which I believe both labor and management hope ultimately to achieve.

Mr. WOLFE. Yes, sir.

At 614:

The CHAIRMAN. I just wanted to see if we could develop the record here in order that there might be an understanding. There was some discussion yesterday and the day before as to the status of the full crew laws of the various States. Have you had an opportunity to consider the problem, and if so, what effect would it have on full-crew laws, if any?

Mr. WALRATH [Chairman, Interstate Commerce Commission]. We are aware of the question. I would like with your permission to let the general counsel comment on that, Mr. Chairman.

The CHAIRMAN. Very well.

Mr. GINNANE [General Counsel, Interstate Commerce Commission]. The incorporation by section 1 of the bill of the procedures and provisions of section 5 of the Interstate Commerce Act could support an argument that includes the provisions of paragraph 11 of section 5. Paragraph 11 in effect provides that a carrier may carry out a transaction approved by the Commission without regard to the restraints of the antitrust laws and of State and local laws and regulations. It could be argued that if the Commission approves, for example, interim rules changing crew consist, that by virtue of paragraph 1 that would cut across

State crew laws. I understand that the Secretary of Labor has testified here that that was not an intended result.

The CHAIRMAN. That is true.

Mr. GINNANE. If the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done simply by making clear in section 1, perhaps parenthetically that paragraph 11 is not to apply.

The CHAIRMAN. I appreciate your very frank response, because I think it has sort of been left up in the air as to what the court might do. There has been expression as to what is intended and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed.

At 837-38:

Mr. FRIEDEL [Representative from Maryland]. Now I want to refer to page 3 of your statement. You say, "suggested a campaign to repeal State full crew laws." I do not know if you heard Mr. Walrath speak the other day or heard his testimony when he said there was a doubt that he could supersede the State laws. He suggested that we amend the bill and put in section 5(11), I think, which would definitely bar the ICC from superseding the State laws.

Mr. WAGNER [President, Order of Railway Conductors and Brakemen]. I was not here, Mr. Congressman, and I didn't hear his testimony, although information was conveyed to me that he had left the impression that perhaps the Interstate Commerce Commission could in some way supersede the State full crew laws that were now in effect.

Mr. FRIEDEL. If this Congress worded the bill as mentioned by the Chairman of the ICC, then he could not?

Mr. WAGNER. I wouldn't want to comment on that without having an opportunity to study that particular part.

Mr. FRIEDEL. I think that is something important to know because I do not think the Congress would want to take that right away. I have a few other questions here.

The CHAIRMAN. Before the gentleman leaves, and for my own information, I would like to raise the question: Why is it considered in one jurisdiction necessary to have a different consist of crews from another jurisdiction?

Mr. WAGNER. Mr. Chairman, that is one of the complications that we run into in our work.

As I said in my testimony and in my statement, you have different conditions on different divisions on the same railroad. The men work under different conditions. You have mountainous territory. You have the deserts. You have railroads where there is a lot of curves, especially in switching operations in industrial plants. There are not two that are the same.

For that reason you have the difference in the crew consist. If you were referring to State laws, Mr. Chairman, I believe that could be answered in this manner: that the lawmakers in the various States evidently were convinced, and feel, that a law of that kind is necessary in order to protect the public that we are talking about here today. There are crossings.

The CHAIRMAN. I am compelled to make the statement now, Mr. Wagner, I wish it was the general policy throughout the Government to give greater recognition to the application of the State laws based on what they think is necessary in those areas.

HOUSE OF REPRESENTATIVES REPORT No. 713, 88th Cong., 1st Sess. (August 26, 1963)

At 14:

The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

II. SENATE COMMITTEE ON COMMERCE

Hearings on S.J. Res. 102 (Railroad Work Rules Dispute), Committee on Commerce, United States Senate, 88th Cong., 1st Sess. (July 23 through August 1, 1963)

At 400-01:

Senator THURMOND [Senator from South Carolina]. I believe there are about 17 States that have laws establishing minimum crews for the manning of trains. Is that the correct number; around that?

Mr. WALRATH. I have heard that; I believe that is true.

Senator THURMOND. These laws are based upon the rights of the States to regulate industry in setting up minimum safety standards for the public as well as the employees, especially to protect the public. I wonder, in your opinion, what effect, if any, would a ruling by the ICC in regard to the crew-consist problems have upon those States having laws establishing minimum crews in the manning of trains. In other words, would your rulings preempt the various State laws on this matter?

Mr. WALRATH. Senator Thurmond, I want my general counsel to correct me if I am wrong.

Let me put it this way: I heard that question asked of the Secretary of Labor in the House only yesterday. He said that it had been researched by his legal staff. I am

not aware that we have researched it recently. But his opinion was that the passage of this or any rules that we approve would not affect the operation of State laws.

As I say, Mr. Ginnane, who sits on my right, may want to supplement that answer. I personally have not researched the question. Nor have I checked the research which the Secretary of Labor says was done over there.

MR. GINNANE. Senator, on page 2 of the bill, section 1, there is the language "in accordance with the procedures and provisions of section 5 of the Interstate Commerce Act."

Paragraph 11 of section 5 generally provides that the carrier may consummate a transaction approved by the Commission without regard to the restrictions of the anti-trust laws and restrictions of State and municipal laws. From that I suppose some part of an argument could be made that where a carrier was authorized to change the crew-manning requirements that that might carry over to set aside the State full-crew laws.

I heard the Secretary of Labor testify yesterday that that was not intended, that they did not intend, by drafting a bill which would authorize the Commission to take only interim action, valid for only 2 years, to brush aside the permanent State full-crew laws.

If it were desired to make that absolutely certain, if that is the desire of Congress it can be done by just a phrase which would exclude paragraph 11 of section 5 of the Interstate Commerce Act.

At 404:

SENATOR LAUSCHE [Senator from Ohio]. Do you know whether the Rifkin recommendation, if it suggested a number of crewmen that were to man an engine or a train, gave consideration to the State laws dealing with that subject?

Mr. WALRATH. I would not know.

Senator LAUSCHE. You would not know?

Mr. WALRATH. No, sir. I would have to check it.

At 478:

Mr. DAVIDSON [Grand Chief Engineer, Brotherhood of Locomotive Engineers]. Mr. Chairman, I was just handed a note that I would like to read into the record, if I may.

Senator PASTORE [Senator from Rhode Island; acting Chairman]. All right.

Mr. DAVIDSON. General Counsel for the ICC, at the House hearing today, stated if this bill passes, the Commission would have jurisdiction over States' minimum crew bills.

Senator PASTORE. I don't want to pass any judgment on that. You have read it into the record. I will check that.

Mr. DAVIDSON. You don't have to say. I wanted you to hear it.

At 629:

Mr. SCHOENE [General Counsel, Railway Labor (union) Executives' Association]. Aside from the procedural difficulties about which we have apprehension, I am frightened by the all-pervading effect that apparently would be ascribed to orders of the Commission in these proceedings. The joint resolution says that applications shall be handled subject to section 5 and the procedures and provisions of that section. Part of section 5 is paragraph 11 of section 5. When I read it I shudder.

It starts out:

Plenary nature of authority under this section. The authority conferred by this section shall be exclusive and plenary.

Skipping further down into the paragraph:

Other carriers and their organizations and their officers and employees and any other persons participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for.

Senator YARBROUGH [Senator from Texas]. Where are you reading from?

Mr. SCHOENE. I am reading from paragraph 11 of section 5 of the Interstate Commerce Act.

Senator YARBROUGH. Thank you. I have it.

Mr. SCHOENE. I certainly visualize that as a bare minimum the carriers will contend that the effect or orders of the Commission authorizing decreases in crew consist—either of enginecrew or traincrew—would operate to overrule full crew laws in those States that have them. Perhaps that explains the alacrity with which the carriers embraced the President's recommendation and endorsed it.

Admittedly, under their proposals, no matter what might be agreed to in settlement, they cannot obtain by collective bargaining any repeal or modification of State full crew laws. According to the information they submitted to us in negotiations, some 20 to 25 percent of the jobs they proposed to take over were in those States.

Perhaps this is the main thing they are looking to, to supersede the laws of the States. But I have no notion whether it stops there. This language is much more extensive.

This says:

They are relieved from the operation of the anti-trust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal insofar as may be necessary to enable them to carry into effect the transactions so approved.

I have no notion with health or safety laws of the States may be claimed to be superseded by order of the Interstate Commerce Commission. I don't know whether this means superseding the hours of service law, where they claim that new rules that they might get authority to put into effect require keeping people in violation of the hours of service law. This is a completely uncharted but highly dangerous field.

At 707-08:

SUPPLEMENTAL REBUTTAL STATEMENT FOR THE CARRIERS IN THE MATTER OF A DISPUTE BETWEEN CERTAIN RAIL CARRIERS AND FIVE RAILWAY LABOR ORGANIZATIONS INVOLVING RULES AND PRACTICES GOVERNING THE USE, COMPENSATION, AND ASSIGNMENTS OF RAILROAD OPERATING EMPLOYEES

The purpose of this supplemental statement for the carriers is to place before your committee various data requested by members of the committee during your oral hearing; to supplement information now before the committee relating to matters in which your members have indicated particular interest, and to evaluate certain contentions of representatives of the organizations to which the carriers have heretofore had no opportunity to reply.

This statement deals with four areas of subject matter, as follows:

1. Job protection benefits offered by the carriers to employees filling redundant positions, maximum numbers

of such employees subject to displacement and financial and other transitional assistance offered to such employees as may be displaced—pages 2 to 6.

. . . .

DISPLACEMENT OF EMPLOYEES

According to the midmonth count of the Interstate Commerce Commission, there are 32,700 firemen employed in freight and yard service by the class I linehaul railroads. It is the position of the carriers that none of these firemen are needed, and that all of the positions that they now fill would eventually be abolished if the recommendations of the Presidential Railroad Commission or of Emergency Board No. 154 were made effective. On the basis of detailed studies made on 9 major railroads, the carriers estimate that there are 18,800 redundant positions now occupied by unneeded road trainmen and yard switchmen. One might suppose from some of the statements presented by the organization before your committee that the carriers propose to "throw all these employees out of work" or "put all of these men out on the street." The facts are these:

1. A study made by the carriers indicates that 25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the States of Arizona, Arkansas, Indiana, Louisiana, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Texas, Washington, and Wisconsin; and that approximately 50 percent of the redundant positions occupied by unneeded trainmen and switchmen are protected by the laws of these States and those of California, Maine, and Mississippi. In these States, even when redundant employees are removed from the working lists [sic] through natural attrition, new unneeded employees must be hired to fill their positions.

Job protection available to redundant firemen, trainmen and switchmen

Categories of employees	Midmonth count of employees				
	Covered by emergency board recommendation		Positions protected by State laws	Maximum number subject to displacement	
	Number	Per-cent		Number	Per-cent
(a) Employees with job rights subject only to natural attrition	39,300	76.3	14,710	0	0
(b) Employees with job rights subject only to natural attrition unless the employer makes available a comparable job with earnings guarantees	6,710	13.0	1,740	0	0
(c) Employees who may terminate their job rights with severance allowances or remain on a seniority list with preferential hiring rights ¹	2,780	5.4	720	2,060	4.0
(d) Employees who may have their employment terminated without transitional benefits ¹	2,710	5.3	700	2,010	3.9
Total	51,500	100.0	17,870		

¹These employees would be eligible for unemployment insurance benefits under the Railroad Unemployment Insurance Act. The Presidential Railroad Commission recommended Washington job protection allowances, retraining assistance and preferred hiring consideration for employees falling into these categories.

III. HOUSE FLOOR DEBATE

109 CONG. REC. at 16122 (August 28, 1963)

Mr. SISK [Representative from California]. Mr. Speaker, I requested this time to ask a question of the chairman of the Committee on Interstate and Foreign Commerce regarding the provisions of State laws having to do with the full crew laws that are in existence, I understand, in some 17 States, including the State of California.

May I ask this question of the chairman of the committee: Is it his understanding that nothing in this joint resolution is to in any way preempt on behalf of the Federal Government the field affecting State full crew laws? If he may make a comment on this, I would appreciate it.

Mr. HARRIS. Mr. Speaker, will the gentleman yield?

Mr. SISK. I am glad to yield to the gentleman.

Mr. HARRIS. This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the labor brotherhoods, the employees' representatives, and the Secretary of Labor. It was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language:

The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.

In a footnote on page 112 of the hearings before the committee on House Joint Resolution 565, the original bill, there is a discussion of the legal basis for State "full crew" laws and a citation to several Supreme Court decisions upholding these laws, such as *Missouri Pacific R.R. Co. v. Norwood* (283 U.S. 249).

Therefore, since this bill does not mention the subject of State laws and since, as the committee report shows, we do not intend to affect these laws, I am confident they are not affected by the bill.

I think that is about as clear as we can make it.

Mr. SISK. Mr. Speaker, I appreciate the statement of the distinguished chairman of the Committee on Interstate and Foreign Commerce. Then certainly as I would understand it, of course, it would be the intent of the Congress that we are not preempting the field in which States have legislated in this area.

Mr. Speaker, I thank the distinguished gentleman from Virginia, chairman of the Committee on Rules, for yielding.

Mr. SMITH [Representative from Virginia]. Mr. Speaker, the colloquy between the gentleman from California [Mr. SISK], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. HARRIS], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority, but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

Mr. EDMONDSON [Representative from Oklahoma]. Mr. Speaker, will the gentleman yield?

Mr. SMITH. I yield to the gentleman from Oklahoma.

Mr. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point.

Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

Mr. SMITH. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 71

CONSOLIDATED
WITH No. 69

ROBERT N. HARDIN, Prosecuting Attorney for
the Seventh Judicial Circuit of Arkansas,
successor in office to Lawson E. Glover,
and JOHN W. GOODSON, Prosecuting At-
torney, for the Eighth Judicial Circuit
of Arkansas _____ *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, MISSOURI PACIFIC
RAILROAD COMPANY, ST. LOUIS — SAN
FRANCISCO RAILWAY COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and
THE TEXAS AND PACIFIC RAILWAY COMPANY — *Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF ARKANSAS

BRIEF FOR APPELLANTS

OPINION BELOW

Both the majority and the dissenting opinions of
the district court (R. 227-279, 279-283) styled as *Chicago,
Rock Island and Pacific Railroad Co., et al., v. Hardin,
et al., and Brotherhood of Locomotive Engineers, et al.*,
are reported at 239 F. Supp. 1 (E. D. Ark. 1965).

JURISDICTION

The judgment of the three-judge district court and injunction prohibiting enforcement of the two Arkansas statutes in controversy was entered on March 8, 1965. A notice of appeal was filed by the Prosecutors on April 1, 1965, on the authority of 28 U. S. C. §1253 (R.292). On March 27, 1965, Mr. Justice White ordered that the injunction of the lower court be stayed (R.294). On June 7, 1965, probable jurisdiction was noted and this appeal was consolidated with an identical appeal of the Brotherhoods from the same cause (R.296).

QUESTIONS PRESENTED

I. Has the Congress of the United States intended by the enactment of Public Law 88-108 to pre-empt the State of Arkansas and responsible State officials from enforcing Act 116 of 1907 and Act 67 of 1913 and to deprive the State of Arkansas of its authority to legislate matters of safety in the railroad industry in the form of crew consist statutes?

II. Whether an actual conflict or inconsistency exists between the Arkansas Acts in controversy, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which requires and has resulted in arbitration of labor disputes of Railroad Management and the Brotherhoods?

III. If Public Law 88-108 nullifies conflicting Arkansas Statutes or merely suspends and prohibits the enforcement of those Statutes for the duration of the National Arbitration and Awards made pursuant to Public Law 88-108?

CONSTITUTIONAL PROVISION INVOLVED

The application of the Supremacy Clause, Article VI of the United States Constitution is in issue in this appeal.

UNITED STATES STATUTE INVOLVED

This case involves the application of Public Law 88-108, 77 Stat. 132 (1963), 45 U.S.C.A. §157 (Supp. V. 1964). This Statute is set out at pages 76 through 78 of the printed record.

ARKANSAS STATUTES INVOLVED

This litigation also involves Act 116, Acts of Arkansas of 1907, codified as Ark. Stat. Ann. §§ 73-720 through 73-722 (1947), and Act 67, Acts of Arkansas of 1913, appearing at Ark. Stat. Ann. §§ 73-726 through 73-729 (1947). These two statutes were attached to the original complaint as exhibits and are found at pages 22 through 24 of the printed record.

STATEMENT

This litigation originated in the United States District Court for the Western District of Arkansas pursuant to the authority of 28 U.S.C. §§ 1331, 1332, 2201 and 2202. On April 10, 1964, a detailed and carefully designed complaint was filed by six large interstate railroads, the appellees here but identified hereafter as the Railroads, against two prosecuting attorneys whose districts encompassed the area where the railroad lines operated. The complaint attacked the validity of two enactments of the General Assembly of Arkansas, Act 116 of 1907 and Act 67 of 1913, which are commonly known and referred to as "full crew" statutes. Act 116 requires that freight trains with certain exceptions shall only be operated with a minimum crew consisting of an engineer, a fireman, a conductor and three brakemen. Similarly, Act 67, enacted in 1913, with certain exceptions, requires that switching operations in cities of first and second class shall only be conducted with a minimum crew of an engineer, fireman, foreman, and three helpers.

Specifically, it was alleged that the two Arkansas statutes were an improper regulation of commerce, constituted a denial of equal protection of the law and comprised a deprivation of property without due process. It was further asserted that the Arkansas statutes had been pre-empted by the enactment of Public Law 88-108. A three-judge court was empaneled in accordance with 28 U.S.C. § 2281.


Thereafter, on motion five national operating unions of the railroad industry, referred to in this brief as the Brotherhoods, were given leave to intervene. The Attorney General for the State of Arkansas, acting throughout this litigation on behalf of the original de-

fendants, which will be noted subsequently as the Prosecutors, and employed counsel of the Brotherhoods filed separate answers to the complaint. These responses each denied the essential and material allegations of the complaint and affirmatively contended that the Arkansas statutes were constitutional and valid (R.28 and 32).

The Brotherhoods then, without the participation of the Prosecutors, moved to dismiss the complaint on the primary proposition that the issues had been previously adjudicated in favor of the constitutionality of the Arkansas statutes. This application was denied. Certain preliminary discovery procedures were then instituted by the Brotherhoods in preparation of the evidentiary hearing on the merits. On October 17, 1964, appellee filed a motion for a summary judgment (R.40, 41). In support of the motion fourteen exhibits were submitted (R.43-224). The main thrust of the motion was that Public Law 88-108 had superseded the Arkansas statutes, but it was also alleged that the Arkansas statutes were discriminatory and denied appellees equal protection of the law. The Prosecutors responded to the motion (R. 225) and separate briefs were filed by each of the three litigants.

On March 5, 1965, the district court rendered its decision. While all of the three judges agreed that there were substantial factual issues in controversy concerning the Railroads' allegations of discrimination and equal protection, the two district judges concluded that Public Law 88-108 was in conflict with the two Arkansas consist laws. It was accordingly held that the state laws were superseded. Judgment was entered on March 8, 1965, for the Railroads and the Prosecutors were enjoined from enforcement of the Arkansas statutes (R.284, 285). The dissenting circuit judge found no discernable conflict

between the federal and state enactments and held that no substantial evidence could be discovered to require pre-emption of the Arkansas Statutes by Public Law 88-108.

An application by the Brotherhoods to the district court to stay the injunction was unanimously denied (R.288). After separate appeals had been filed in the district court (R.287 and 292), a stay of the injunction was ordered by Mr. Justice Byron R. White pending the decision of this Court upon jurisdictional aspects of the case (R.294). An effort to modify the order was denied on April 2, 1965. Finally, probable jurisdiction was noted on June 7, 1965, and the appeals of the Prosecutors and the Brotherhoods were consolidated for argument and consideration (R.296). 

SUMMARY OF ARGUMENT

I

The Congress of the United States Did Not Intend to Deprive the Several States of Their Authority to Legislate and Establish Minimum Railroad Crew Compositions in Certain Prescribed Circumstances.

A. *The Police Power Authority of the States Occupies a Preferred Status.*

The authority of the state to legislate for the health, safety and welfare of the general public is a well-established principle. *Terminal R.R. Ass'n v. Brotherhood*, 318 U.S. 1 (1943). The inherent police power of every state is an indispensable essential attribute of sovereignty. It rests to a large extent on the maxim, "*salus populi suprema lex.*" *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U.S. 1 (1896).

The history of the litigation challenging the two Arkansas statutes in controversy here is most persuasive and confirms the preferred status of inherent state police power authority. Act 116 was determined to be valid under an attack of unconstitutional regulation of commerce, a denial of equal protection and deprivation of property without due process. *Chicago R.I. & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453 (1911). Similarly, two years later Act 67 also withstood a challenge of invalidity. *St. Louis and I. M. and So. Ry. v. Arkansas*, 240 U.S. 518 (1916). Both of these full crew statutes were tested again on identical contentions and, in addition, were alleged to have pre-empted by the enactment of the Interstate Commerce Act and the Railway Labor Act. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931); see also *Missouri Pac. R.R. v. Norwood*, 290 U.S. 600 (1933).

The legislative bodies are peculiarly able and purposely adapted to be knowledgeable and competent to express the will of their people and enact proper and remedial legislation.

There is a strong presumption in favor of the validity of state statutes. Where there are two apparent conflicting statutes, the courts have traditionally made every effort to construe them in *pari materia*. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). When considering the validity of a law, the reviewing court will properly refrain from evaluating the wisdom or expediency of the statute and will confine examination to the narrow constitutional issues involved. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

Just as other laws require continued scrutiny and supervision, the statutes and regulations directed to the safe operation of railroad traffic undergo enactment, alteration and repeal as circumstances and conditions demand. Although the legislatures, the electorate, and state courts have reconsidered the efficacy of state railroad minimum crew consists, this does not infer that more stringent requirements are not necessary in other states or that any state should be deprived of the authority to re-enact new regulations when deemed justified.

B. *The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.*

All should concede that Public Law 88-108 was enacted to compel compulsory arbitration to circumvent a nationwide strike. The Congress made every effort in the

drafting and enactment of Public Law 88-108 to avoid any possible conflict with state minimum crew statutes. The legislative history is decidedly in favor of the proposition that the state statutes were intended to remain in full force and effect.

If a controversy does exist as to the application of the Award in regard to state crew consist laws, pre-emption by implication is contrary to the weight of authority. *California v. Zook*, 336 U.S. 725 (1949); 1 *Southerland Statutory Construction*, § 2026.

It is also clear from the record that the parties bound by the Award were limited to certain participating carriers and unions. Public Law 88-108, § 1; (R.76); *In Re Certain Carriers*, 229 F. Supp. 259 (D.C. 1964). It must be emphasized that no state received an invitation or participated in the arbitration. Also, it may be granted that safety was a factor to be considered by the Arbitration Board and that special boards of adjustment were convened, but under the circumstances these bodies could not satisfy the unique demands of safety in the various states.

II

No Genuine Conflict of Inconsistency Exists Between the Arkansas Acts in controversy and Public Law 88-108.

There is no actual inconsistency existing either in Acts 116 or 67, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which required and resulted in arbitration of work rule differences between railroad management and the brotherhoods.

The Congress of the United States may, in its discretion, exercise complete authority of a subject of interstate commerce. *Gibbons v. Ogden*, 9 Wheat. 1 (1924). Both federal and state statutes may operate and govern the same issue so long as the presence of the latter does not frustrate the operation and objectives of the former. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In the absence of a clear manifestation of legislative purpose, the federal enactment must be so comprehensive as to be incompatible with the local law before the state statute will be superceded. *Local 20 v. Morton*, 377 U.S. 252 (1964). Hence, affirmance of the district court's decision must rest on the foundation that Public Law 88-108 has so substantially occupied the field of minimum railroad crews as to override all state statutes on the subject. But the spirit of the Award does not prohibit the employment of additional trainmen that might be required by state statutes or the desire of railroad management. Likewise, both Act 116 and Act 67 are directed to minimum crew schedules deemed necessary for the safety and welfare of the railroad employees and the general public as well.

Excluding the decision of the district court, the Prosecutors have been unable to discover any judicial decision which holds that arbitration between unions and management acts to nullify state statutes and is binding on the state.

III

*If State Crew Consist Statutes Have Been Suspended,
it is Only For the Duration of the National Award.*

Should this Court determine that Public Law 88-108 and the awards made thereunder must pre-empt state full crew statutes, then the Prosecutors urge reversal

of the district court's judgment holding that the pre-empted statutes would not be revived at the termination of the Arbitration Award.

The great weight of legal precedent is in favor of the proposition that a pre-empted law is revived at the conclusion of the life of the superseding authority. *Tua v. Carriere*, 117 U.S. 201 (1886); 1 *Southerland Statutory Construction*, § 2027. The Award was to terminate within two years after its enactment and was to give only temporary relief to the work rules controversy.

The district court held that the objectives of Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the Award. However, as a practical matter revival of state statutes could not offer any conflict after the Award had expired. The majority of the district court was convinced that state full crew statutes restrict collective bargaining rights that were granted by the Railroad Labor Act. This conclusion ignores the fact of past successful collective bargaining practices in Arkansas. The reasoning of the district court which would incorporate Public Law 88-108 as a part of the Railroad Labor Act possesses as much merit today as it did in 1931 when an almost identical contention was rejected. *Missouri Pac. Ry. v. Norwood*, *supra*. Finally, it is laudable to protect the uninterrupted flow of transportation in interstate commerce in the national public interest but how this goal will be enhanced by the absence of state crew laws is not explained. The only way to prohibit future railroad labor management controversies would be to maintain perpetual compulsory arbitration and this was exactly what the Congress intended to avoid.

ARGUMENT

I

The Congress of the United States Did Not Intend to Deprive the Several States of Their Authority to Legislate and Establish Minimum Railroad Crew Compositions in Certain Prescribed Circumstances.

A. *The Police Power Authority of the States Occupies a Preferred Status.*

The authority of a state to legislate for the health, safety and welfare of the general public as a legitimate exercise of police power is a long established and fundamental principle. *Reid v. Colorado*, 187 U.S. 137 (1902); *Terminal R.R. Ass'n v. Brotherhood*, 318 U.S. 1 (1943). This authority is qualified, of course, by a criteria of reasonableness and must not run afoul of or conflict with constitutional provisions and prohibitions. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Savage v. Jones*, 225 U.S. 501 (1912). The police power is said to be indispensable, essential attribute of sovereignty found in every civilized government. *Geurin v. Little Rock*, 203 Ark. 103, 155 S.W. 2d 719 (1941). It rests to a large extent on the maxim, "*salus populi suprema lex*". *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U.S. 1 (1896), affg. 121 Mo. 298, 24 S.W. 591. The extent of this power or an attempt to define its outer limits is fruitless for each case must turn on its own facts. *Berman v. Parker*, 348 U.S. 26, at 32 (1954). Hence, a statute may be constitutional on its face but unreasonable and oppressive and therefore unconstitutional in its application. *Cf. Pennsylvania R.R. Co. v. Driscoll*, 330 Pa. 97, 198 A. 130 (1938) reversed 336 Pa. 310, 9 A. 2d 621 (1939).

The right to legislate and govern was placed in each sovereign state. The founders of this nation, in their wisdom recognized that each geographical and political area was best able to diagnose and prescribe for its own ills. The citations found throughout this brief emphasize the fact that many states have enacted varied safety regulations and particularly minimum crew laws governing the railroad industry.

The history of the litigation challenging the two Arkansas statutes in controversy here is most persuasive and confirms quite dramatically the preferred status of inherent state police power authority. Act 116 was determined to be valid under an attack of unconstitutional regulation of commerce, a denial of equal protection, and deprivation of property without due process. *Chicago R.I. & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453 (1911). Similarly, two years later Act 67 also withstood a challenge of invalidity. *St. Louis and I. M. and So. Ry. v. Arkansas*, 240 U.S. 518 (1916). Both of these full crew statutes were tested again on identical contentions and, in addition, were alleged to have pre-empted by the enactment of the Interstate Commerce Act and the Railway Labor Act. *Missouri Pac. R.R. v. Norwood*, 283 U. S. 249 (1931); see also *Missouri Pac. R.R. v. Norwood*, 290 U.S. 600 (1933).

It is recognized and accepted that the mere fact that the state legislation involves an area of interstate commerce does not, in itself, invalidate the enactments.

The different provisions of statutes, the many judicial pronouncements and other matters prominent in the history of minimum railroad crew requirements have not resulted from either zealous legislatures or careless

tribunals. On the contrary, the propriety and validity of governmental regulations are founded upon compelling logic and reason which have been critically surveyed from every corner and defies criticism. Some states may have little or no railroad traffic while others may have their entire economy bound by an immense railroad complex of mileage and traffic. Severe or moderate weather may be a substantial factor of consideration. Both terrain and density of population deserve prominent attention. Even past evils, death and disaster may prompt governmental inquiry and legislative action. Both the safety of the railroad employee and the general public must each be weighed. The legislatures are assuredly aware of the number of jobs, the benefits of creating a healthy atmosphere for the continued growth of the railroad industry and the profits of stockholders. However, the general welfare of the entire community is the compelling accomplishment which is sought to be obtained. In all of these matters of consideration previously mentioned and others too numerous to relate, the legislative bodies of the several states are peculiarly able and purposely adapted to investigate, be knowledgeable, and competent to express the will of their people and enact proper and remedial legislation. It is against this background that state statutes not only are benefited by a presumption of validity but also occupied a favored status. Both the state and federal judiciary have adhered to the principle that where a statute is susceptible of two interpretations, one valid and the other invalid, that of validity will be adopted and where there are two apparent conflicting statutes, every effort will be made to construe in *pari materia*. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). Finally, it is understandable that reviewing courts have properly refrained from evaluating the wisdom or expediency of the statute under consideration, but confine their examination to the nar-

row constitutional issues involved. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

Just as other laws require continued scrutiny and supervision, the statutes and regulations directed to the safe operation of railroad traffic undergo new enactment, alteration and repeal as circumstances and conditions demand. The activity of several states in the past few years confirms that the legislatures, the electorate, and state courts have for undisclosed reasons reconsidered the efficacy of state railroad minimum crew consists. This does not infer, however, that more stringent requirements are not necessary in other areas or that those states should be deprived of the authority to re-enact new regulations when deemed justified.

B. The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.

Although the circumstances and conditions underlying the railroad-labor dispute which culminated in the enactment of Public Law 88-108 were meticulously reviewed in the opinion of the court below (R.239-248), it is necessary, in order to gain proper perspective of the questions involved in this cause, to briefly review those most significant events once again.

It is too clear to be misinterpreted that the President of the United States, by his message of July 22, 1963 (Pl. Ex. 1; R.43-45), was compelled to recommend drastic action in the form of compulsory arbitration by the unfruitful and disappointing efforts failing to resolve a labor dispute of national magnitude and importance. (See appendixes to Message, R.59-74, and Pl. Ex. 2, "Report of the Presidential Railroad Commission, Washington, D. C., February 1962" which accompanies the

printed record for further historical background.) The singular purpose sought to be served was avoidance of a nationwide strike which would have paralyzed or at least crippled the entire economy by submission of work rule disputes to the Interstate Commerce Commission (R.48).

One significant alteration of the mechanics of operation as proposed by the President was made by the Congress. This change is particularly important to this litigation because it is most indicative of the fact that every precaution was made by the Congress to avoid any possible conflict with state enacted minimum crew statutes. The suggestion by President Kennedy that the Interstate Commerce Commission be employed as the vehicle to receive, assimilate, and resolve work rule changes caused much consternation in the Congress. It was contemplated that these changes would be disseminated in the form of regulations of the Commission. When this prospect was discussed in the Congress some grave doubt was expressed, or at least some anticipation, that state enacted minimum crew statutes were susceptible to cancellation if they were thought to be in derogation of the regulations promulgated by the Commission. Rather than hazard this risk, all references to the I.C.C. in the proposed joint resolution was omitted and substituted in its place was the creation of the Arbitration Board. As finally enacted, the command of Public Law 88-108 was concise and unambiguous. It may be unequivocally stated that the attainment of equitable and enforceable work rules which precipitated the legislative scheme and the end result were entirely consistent. Neither the statement of the President nor Public Law 88-108 contained any language that dictated, or even suggested, abolition of state enacted minimum crew laws. Only the true source of difficulty, the proposed work rule changes were identified.

The opinion of the neutral members of Arbitration Board No. 282 stated the problem:

"We have been asked to decide only two issues which separate the parties: the so-called 'fireman (helper)' issue and the so-called 'crew consist' issue" (R.97).

The fact that the crew consist issue is not synonymous with state enacted crew laws is evident by the later comment:

"All citizens must join in the hope that failures of leadership — on either side — will not again make it necessary for the government to do for the parties what the parties should do for themselves" (R.97).

It may be argued that safety was an expressed factor to be considered by the Arbitration board. Award (R. 82). Perhaps the Board did abide by this admonition, but it must be recognized that local circumstances and conditions are so varied that it would be indeed fanciful, in absence of some expression of direction, to conclude that the Board seriously entertained the thought, much more embarked on a program, to occupy every facet of local full crew requirements. Moreover, the comments of the members of the Board support the conclusion that state laws were not the target of their efforts. The neutral members phased the restrictions by this language:

"Though our authority comes from Congress, the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement. There

are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview" (R.97).

A satisfactory answer is not found in the provision for special boards of adjustment. Award, Part C — Guidelines (R.92-94). The eleven listed general considerations together with ten additional particular considerations seem to approach some adequate criteria for compulsory arbitration of work rules. But when weighed on a scale for safety and welfare of the general public, the results are not so gratifying. In the instance under consideration, three special boards were assembled, each composed of the same three members (Pl. Ex. 5; R.174-202). A huge geographical area was designated as their responsibility. In the report, special considerations in Arkansas were limited to a switchyard in Paragould (R. 182-185) and the observation that a switchyard at Little Rock was automated (R.199). This is hardly an acceptable response to the question of safety in Arkansas for it cannot be validly presumed that, with the exception of Paragould and Little Rock, the balance of Arkansas is consistent with the national equation of safety. These patent deficiencies require the conclusion that except for the most general guides of safe railroad operation, both the Congress and the Arbitration Board intended and thought that all special problems would be left, as had been before, in the capable hands of the respective state governments.

Most indicative of all to the Prosecutors, there exists in the Award those provisions granting railroad management certain discretion in fixing the size of crews in excess of the prescribed award. Likewise, the local union chairman is granted authority to add, under certain cir-

circumstances or at his pleasure, Additional crewmen up to 10 percent in excess of the Award (Award, II B (2); R. 83). Perhaps the latitude conceded to management and labor can be adequately described as gratuities, but little comfort can be gleaned where there exists only a hap-penstance relationship to safety. Such circumstances speak most forcefully that Arbitration Board No. 282 was only seeking to compromise and revise work rule difficulties rather than supplant various state regulations and statutes. Armed with such abbreviated facts and no pretence of knowledge of local conditions and special problems, little more could reasonably be asked of the Board. Uniformity may be a desirable foundation for collective bargaining arrangements, but the superior dictates of safety cannot be made a slave of unanimity.

The legislative history is decidedly in favor of the proposition that the state statutes were to remain in full force and effect. See Hearings on H.J.Res. 565 (Railroad Work Rules Dispute), 88 Cong., 1st Sess. 78; Hearing on S.J.Res. 102 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. 400. A search of the published hearings reveals that perhaps there were only two or three instances where expressions were made to the contrary. Hearings H.J.Res. 565, 88th Cong., 1st Sess., pp. 111-114; hearings before Senate Committee on Commerce on H.J.Res. 565, pp. 400-401. Conceding *arguendo* that a controversy may have existed as to the impact of Public Law 88-108 on state crew consist laws, pre-emption by implication is contrary to the weight of authority. *E.g.*, *California v. Zook*, 336 U.S. 725 (1949); *Schwartz v. Texas*, 344 U.S. 199 (1952); 1 *Southerland Statutory Construction*, § 2026.

Arbitration Board No. 282 was convened, and made the Award pursuant to the congressional mandate. See *Brotherhood of Locomotive Firemen v. Chicago, B. & O. R.R. Co.*, 225 Supp. 11 (D.D.C. 1964), Affmd., 331 F. 2d 1020 (D.C.Cir. 1964, cert. den., 377 US. 918 (1964)). Their investigative data was to be furnished by the Secretary of Labor. Public Law 88-108, § 3 (R.77). One railroad yard in Chicago was visited for the purpose of orientation (R.81).

It is apparent from the record in this cause that no state official participated or was appointed to the Board. If it had been the purpose and objective of Public Law 88-108 to furnish an absolute national scheme to supersede state statutes and regulations, then most reasonably, interested and vital state commissions, agencies and departments would have been consulted. From this point alone it appears that the Board was ill-equipped and uninformed to accomplish nothing more than mediation of the disputed work rule changes causing the labor-management conflict. It is remarkable that even this was accomplished within the ninety day limitation imposed by Congress. Public Law 88-108, § 5 (R.77). Certainly a larger more intricate task could not be concluded in such a perfunctory time.

The majority of the court below relied substantially on the decision of *In Re Certain Carriers*, 229 F. Supp. 259 (D.C. 1964) where it was stated at 260:

“The Award is final and binding on both sides and must be obeyed by all parties.”

It is well at this juncture to determine just who composed the parties to the Award. It is noted at Section 1 of Public Law 88-108:

“That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices” (R.76).

Further identification of those parties is found in the Award of Arbitration Board No. 282 (R.80). There, the carriers are named as “Certain Carriers Represented by the Eastern, Western, and Southeastern Carriers’ Conference Committees”. The brotherhoods involved are the same as those composing the appellants in case No. 69 who intervened when this suit was instituted in the district court. It is conclusive then that no state or responsible organism of any state was a participating party. This might be unavailing as it was ignored by the district court. However, coupling this factor with the disclosure that several major railroad carriers were not involved in or bound by the Award and that the Award may be extended, terminated or altered only by agreement of the participating unions and carriers the true significance of the entire legislative scheme to circumvent a nationwide strike which was drawing dangerously near is brought once again sharply into focus. This conclusion is also supported by several questions which demand response. What has happened to full crew legislation in those states where there were no participating carrier lines? Were those statutes pre-empted? If no crew consist acts were in force at the time of the Award are the states prohibited from enacting minimum consist laws in the future? If the parties to the Award may consummate other agreements, is it possible for car-

riers not participating in the Award to agree to different provisions than those contained in the Award? In other words, if the Award is to be applied uniformly, as the majority opinion of the lower court suggests will only those carrier and unions bound by the Award dictate to other carriers what provisions should be contained in the work rules? If so, is this not an unusual reward for the carriers who possessed "leadership" reaching satisfactory agreements with the brotherhoods and so did not desire to serve notices or participate in the Award? Finally, would Congress impose upon the several states such an imperfect and unstable device in the place of state authority to enact necessary and reasonable crew laws? In spite of all this, the lower court said the objective of Public Law 88-108 was to insure a preferred national policy of uniformity when uniformity could not possibly result by design but only by accident.

While on the subject of uniformity, one further discrepancy must be noted. Of course, the object of the Railroads' complaint was relief from the "intolerable burdens" of Act 116 and Act 67. However, no challenge was made of Act 298 of 1909, codified as Ark. Stat. Ann. §§ 73-723 — 73-725 (1947). This enactment is an essential part of the statutory full crew compliment in Arkansas. It is provided by Ark. Stat. Ann. § 73-723 that:

"No railroad company or officer of court, owning or operating any line or lines of railroad in this State, and engaged in the transportation of passengers over its line or lines, shall equip any of its said passenger trains with a crew consisting of less than an engineer, a fireman, a conductor, a porter and a flagman or brakeman, except as hereinafter provided."

There is then excepted from the operation of the Act railroad companies with lines less than 100 miles in length and passenger trains consisting of less than three cars. Act 298 Section 3, Acts of Arkansas 1909. The Award itself makes no distinction of freight or passenger service except at Part C—Guidelines where particular considerations are set forth for the benefit of special boards of adjustment (R.92, 93). It might easily be assumed that Act 298 of 1909 is likewise pre-empted by Public Law 88-108 and the Award, but the carriers agreed to comply with passenger train complement (R.100). Still Act 298 remains in an attitude of legal limbo. It will be interesting, to say the least, to rationalize the propriety of Act 298 in conjunction with Act 67 concerning the switching of passenger trains in cities of the first and second class. The Award is simply incapable of being transformed to supplant state crew consist laws.

II

No Genuine Conflict of Inconsistency Exists Between the Arkansas Acts In Controversy and Public Law 88-108.

The Prosecutors maintain that there is no actual inconsistency existing either in Acts 116 or 67, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which required and has resulted in arbitration of work rule differences between railroad management and the brotherhoods.

It is conceded that the Congress of the United States in its discretion may validly exercise complete authority over a subject of interstate commerce. *Gibbons v. Odgen*, 9 Wheat 1 (1924); U.S. Const. Art. I. § 8; *Virginia Ry. v. Federation*, 300 U.S. 515 (1936). It may be granted

that both federal and state statutes may operate and govern the same issue so long as the presence of the latter does not frustrate the operation of the former. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). An earnest effort has been made at the initial topic in this brief to demonstrate that Public Law 88-108, the National Award, and legislative history all confirm an intent not to supersede state full crew laws. Even this record as presently constituted is replete with expressions on the part of Congress not to pre-empt state minimum crew laws. It is recognized that in the absence of a clear manifestation of legislative purpose, the federal enactment must be so comprehensive as to be incompatible with the local law before the Supremacy Clause will be invoked to supercede the conflicting statute. *Local 20 v. Morton*, 377 U.S. 252 (1964). Hence, in this case, affirmance of the lower court's decision must rest on the foundation that Public Law 88-108 has completely or so substantially occupied the area of minimum railroad crews as to override all state statutes on the subject.

Such an adversity was urged by the Railroads in the district court to have created sort of a theoretical concept of jeopardy. The majority of the district court accepted the proposition finding an irreconcilable conflict and adjudged that the Railroads could not comply with the Award while abiding by the requirements of the Arkansas crew consist statutes (R.270). It is submitted that this proposition is untenable. The conflict is more apparent than real and more contrived than believed. It must be reiterated that the National Award provided for arbitrary changes of the work rules which prohibits the unions from insisting on greater job compliments through collective bargaining. The spirit of the arbitration does not prohibit the employment of additional trainman that might be required by state statutes or the desire of rail-

road management. In fact, it is incomprehensible to believe that this interpretation would possibly violate the Award.

Likewise, both Act 116 and Act 67 are directed to minimum crew schedules deemed necessary for the safety and welfare of the railroad employees and the general public as well. Specific provisions are allowed for additional crewmen. See Exhibits "A" and "B" to complaint, Act 116 of 1907, R.22, and Act 67 of 1913, R.23. They leave for railroad management or traditional collective bargaining negotiation the ultimate determination of road, yard or switching crew composition in excess of the statutory minimum.

The lack of depth to the theory of incompatibility is revealed by the two-year termination period provided by Public Law 88-108 (§§ 4 and 8; R.77, 78). The district court held that the expiration of the award would not revive the state statutes or provide the states with new authority to enact new statutes. It is understood that at the conclusion of the compulsory arbitration period, the unions and the carriers will be free to negotiate further. There is no assurance, however, of what standards will be used. Furthermore, the Award itself and the entire legislative arbitration complex, can be altered or terminated any time by the agreement of the parties. Hence, even if it may be presumed that the Board, as originally constituted, was concerned with at least the fundamental aspects of railroad safety, which undoubtedly was directed more to the benefit of employees than the general public, this concern, after the expiration of the Award, is to be substituted by purely economic factors, self-help, and collective bargaining. Under these circumstances, it is obvious that the safety and welfare of

the national public, if important at all initially, will be relegated to a merely ancillary position in connection with the negotiation and settlement of labor contracts.

Excluding the decision of the district court, the Prosecutors have been unable to discover any other judicial decision which holds that arbitration between unions and management acts to nullify state statutes and is binding on a state.

III

*If State Crew Consist Statutes Have Been Suspended,
it is Only for the Duration of the National Award.*

Should this Court determine that Public Law 88-108 and the Awards made thereunder must pre-empt state full crew statutes, then the Prosecutors urge reversal of the district court's judgment holding that the pre-empted statutes would not be revived at the termination of the Arbitration Award.

It is believed that the basis of the decision of the district court is not only void of supporting legal authority, but lacks logic and reasoning as well. The great weight of legal precedent is decidedly in favor of the proposition that a pre-empted law is revived at the conclusion of the life of the superseding authority. *Tua v. Carriere*, 117 U.S. 201 (1886); 1 *Southerland Statutory Construction* § 2027.

The conclusion that the Award was only to last for a two year period is inescapable, but the majority of the court below refused to recognize the plain limitation of Public Law 88-108, stating:

"When the uncontroverted facts as reflected by the record before the court are considered, the court is convinced that the purpose and intent of Congress in enacting Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the awards, which would occur on May 6, 1966."

• • • • •

"Without doubt, it was contemplated and provided that any changes made thereafter in crew consists would be governed by collective bargaining conducted pursuant to the procedure prescribed by the Railway Labor Act. That Act protects and promotes collective bargaining, *California v. Taylor, supra*, and supersedes state laws that restricted the collective bargaining rights that were granted and recognized by the Railway Labor Act."

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"Not the least of the court's consideration is the substantial public interest involved relative to the uninterrupted and orderly flow of goods in interstate commerce as well as the necessity for an efficient and orderly railway transportation system as part of the national defense effort. (See Letter Advisory Opinion from General Counsel of the Department of Defense Joint Resolution Committee, U.S. Code Cong. and Adm. News, 1963, p. 842, which states that any interruption in rail service would severely impair the defense effort.)" (R.273).

The decision of the district court has no relation, and is in fact adverse to, the original scheme announced by President Kennedy in the message of July 22 where he stated:

" . . . For a 2-year period during which both the parties and the public can better inform them-

selves on this problem and alternative approaches — interim work rule changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification . . . ” (R.48).

Neither can the decision find any support in the provisions of Public Law 88-108. The specific interim application is expressed in plain terms at Section 4, where it is provided:

“The Award shall continue in force for such period as the arbitration board shall determine in its award, but *not to exceed two years* from the date the award takes effect, unless the parties agree otherwise.” (Emphasis added.) (R.77).

Finally the results of the efforts of Arbitration Board No. 282 makes the definite and unequivocal statement at IV of the Award that:

“This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise” (R.95).

What seems most important of all, the decision of the majority below while seeking to accomplish laudable ends has created utterly ludicrous results. Without being so presumptuous as to speculate on “the multitude of conflicts” (R.275), a reasonable interpretation of the decision of the lower court seems founded upon three primary considerations: (1), it is stated that Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the Award; (2), the superseded state laws restrict collective bargaining rights that were granted and recognized by the Railroad Labor Act; and, (3), revival of the several state laws would interrupt the orderly flow of goods in interstate commerce (R.273).

Just how these goals will be secured or be enhanced by the absence of state crew laws is unexplained. As to the initial contention it must be observed that the purpose and intent of Congress in enacting Public Law 88-108 could not be frustrated by reinstatement of state minimum crew laws after expiration of the awards simply because there would be no federal statute or Award. The district court would by judicial fiat extend both Public Law 88-108 and the Award where Congress has expressed a contrary intention. Second, existence of state crew consist statutes would not in the future restrict the collective bargaining rights anymore than they have in the past. In this regard it is imperative to keep foremost that it was the "anachronistic" work rules, not the full crew laws, which were the source of the dispute and condemned by the neutral members of Arbitration Board No. 282 (R.128). In view of the past successful collective bargaining practices in Arkansas, and apparently no unusual difficulty has been encountered in other states having full crew regulations, it would seem that the district court's fear of prohibition of extant mediation procedures is totally unfounded. A vain effort to incorporate the entire scheme of Public Law 88-108 and the resulting Awards as a part of the Railway Labor Act seems fruitless indeed in view of the total lack of substance to this proposition. The reasoning of the district court possesses as much merit today as it did in 1931 when an almost identical contention was rejected in *Missouri Pac. Ry. v. Norwood*, *supra*. The final reason expressed by the district court can be disposed of just as effectively as the previous two grounds. Here, the basis of the complaint sounds in the national public interest of the uninterrupted flow of transportation in interstate commerce. But it would seem that the only way to prohibit future railroad labor-management con-

flicts would be to maintain perpetual compulsory arbitration; not abolition of full crew laws. Of course, a permanent machinery for continued compulsory arbitration was exactly what the Congress intended to avoid. See *Senate Hearings*, 460, 397; 109 *Cong. Rec.* 15892 (1963); 109 *Cong. Rec.* 15960 (1963).

One final aspect remains for comment. As noted previously, the application of Public Law 88-108 was expressly limited by Section 1 to those carriers and labor organizations that had served notices pursuant to the Railway Labor Act (R.76). To reiterate, the resolution expired 180 days after the date of its enactment (§ 8, R. 78) and the Award is to expire within two years after it takes effect "unless the parties agree otherwise." Public Law 88-108, § 4 (R.77); Award, IV (R.95).

Couched in this composure this is the result of the district court's decision: State authority to enact full crew laws have been forever withdrawn in preference of certain carriers' and labor unions' joint agreement to extend or make alternative work rules under a law that will expire at a particular time and in favor of future collective bargaining arrangements which may be dictated by any number of unforeseen circumstances.

The Prosecutors refuse to accept the proposition that the Congress intended to create such chaos.

CONCLUSION

This litigation has been revealed to be extremely important to the State of Arkansas and to each of the states as well. This is just as true irrespective of the presence of current full crew statutes or regulations, for if the decision of the lower court is affirmed, each state will be deprived of its traditional and established authority to enact reasonable safety regulations applicable to the railroad industry. This police power is a precious requisite to enable each state to discharge its obligations for the health, safety, and welfare of its citizens. If the decision of the district court is affirmed a dangerous precedent will be set threatening virtually every aspect of state governmental authority which touches with a concurrent area of federal involvement.

It is therefore urged that in recognition of the several established principles recited by the Prosecutors, the decision of the court below be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1965
Nos. 69 & 71 (Consolidated)

ROBERT N. HARDIN, Prosecuting Attorney for the
Seventh Judicial Circuit of Arkansas, *et al.*
Appellants,

AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*
Appellants,

V.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COM-
PANY, *et al.*, *Appellees.*

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF ARKANSAS

BRIEF OF AMICUS CURIAE ON BEHALF
OF THE STATE OF WASHINGTON IN
SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The State of Washington is in a position essentially similar to that of the appellant prosecuting attorneys in the controversy presently before the court. Now pending before the United States District

Court for the Western District of Washington is *Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al. v. Pearson, et al.*, Civil Action No. 6214, by which the several common carrier railroads operating within the state seek to enjoin enforcement of the Washington Full Crew Laws (RCW 81.40-.020, et. seq.). The individual members of the Washington Utilities and Transportation Commission, the Attorney General of the State of Washington, and the prosecuting attorneys for Washington's thirty-nine counties have been named as defendants.

On its own motion, the three judge federal court convened to hear the matter, separated the issues raised by the complaint, and on May 17, 1965 heard argument on the question of preemption of the full crew laws by the adoption of Public Law 88-108. As yet no decision has been filed. It is clear, however, that the decision of this court on the preemption issue with respect to the Arkansas statutes will be dispositive of the same issue insofar as Washington law is concerned.

It is the position of the State of Washington that there is nothing in Public Law 88-108 by which the Congress of the United States has indicated an express or implied intent to have that law supersede state full crew laws; the legislative history of Public Law 88-108 militates against such a determination; and there is no inherent conflict between Public Law 88-108 and its progeny and the Washington full crew law which would justify a holding of preemption.

SUMMARY OF ARGUMENT

This case presents the issue of whether the adoption of Public Law 88-108 has the effect of superseding state full crew laws prescribing the crew consist of freight trains. In order to determine this issue, it is necessary to examine the intent of Congress in enacting the law in question, both in terms of the language employed in the act, and in the pertinent legislative history. Since Public Law 88-108 created an arbitration board and directed the attention of the board to certain issues in a labor dispute, it is also necessary to examine the action of the board to determine its concept of its own powers. Finally, because one of the several criteria of preemption is conflict between state and federal law, it is essential that the conflict question be explored fully.

I.

Public Law 88-108 was enacted by Congress in an effort to find some basis for settlement of a lengthy *labor* dispute. It arose from the filing of certain notices by rail carriers and railroad brotherhoods as to their intentions with respect to operating rules and regulations relative to the manning of freight trains.

The arbitration board created pursuant to this law was temporary in character and was confined to a determination of the issues raised only in these notices, which could not have the effect themselves

of superseding state law to the contrary. The award was to be binding only upon the carrier and organization parties to the dispute. Operations by rail carriers within states having full train crew laws were not within the issues framed by the law, and these states were certainly not parties to the dispute to which congressional attention was directed. Therefore, by no express or necessarily implied language is there any intention of Congress to affect state full crew laws.

II.

It has long been held by this court that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent or supersede the exertion of state police powers in matters of health, safety and welfare, *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249 (1931), *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). No such expression of intent is to be found in Public Law 88-108. Similarly, this court in deciding preemption issues, has distinguished those cases involving matters of safety, health and welfare from those cases in which these traditional state powers have not been at issue. Public Law 88-108 does not reflect the establishment of a single and all-embracing regulatory scheme or the pervasive assertion of federal jurisdiction over the subject matter of train

manning so as to indicate preemptive intent. Many cases relied upon by the Arkansas District Court in this case have been expressly distinguished by this court on that basis. *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

III.

The pertinent legislative history of Public Law 88-108 reveals a specific disclaimer on the part of Congress that it intends preemption of state law to result. Senate Committee Report No. 459 describes the act as a "one-shot" effort to reach "settlement" of a "labor dispute" between "carriers" and "certain of their employees." The report of the House Committee stated specifically that it was not intended that any awards supersede or modify any state law relating to the manning of trains.

In their testimony before the United States Senate, the railroads themselves admitted that the state full crew laws would preclude the discharge of firemen and train crewmen required by such laws.

IV.

The arbitration board created pursuant to Public Law 88-108 recognized the explicit limitations in the act authorizing its existence. It purported to set no national rule or policy on either the trainmen or firemen issues, recognizing that state full crew laws were to be fully effective.

Similarly, the board noted that its powers were

confined to those issues framed by the parties (carriers and organizations), and that the scope of the board actions could not exceed the scope of the action the parties themselves could take had they been able to reach agreement. Since the parties by their own action could not supersede state law, neither could the board under the issues as expressly framed by Public Law 88-108.

V.

The Arkansas Court conceded in its decision that no express or necessarily implied language of preemptive intent could be found in Public Law 88-108. For this reason, the basis for the court's decision is "an actual and apparent conflict" between the congressional enactment and state full crew laws, in spite of the *caveat* in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), which enjoins seeking out conflicts between state and federal regulation where none clearly exists.

The "conflict" issue in the instant case falls with great precision within the framework of *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). A critical analysis of the majority and minority opinions reveals conclusively that Public Law 88-108 does not create an irreconcilable conflict between this act and state full crew laws. The existence of diverse minima does not create an irreconcilable conflict between state and federal law.

Public Law 88-108 shows no intention to establish a national uniform policy or a pervasive scheme

of federal regulation. The congressional purposes and objectives do not encompass a determination of the proper size or consist of train crews in operations as to which state laws have already spoken. This being so, state full crew laws do not stand as an obstacle to the accomplishment of the purposes and objectives of Congress.

ARGUMENT OF AMICUS CURIAE

I. PUBLIC LAW 88-108 DOES NOT EVINCE AN INTENT BY CONGRESS TO PREEMPT STATE FULL CREW LAWS

Public Law 88-108 (77 Stat. 132) was enacted on August 28, 1963 and is codified at 45 U.S.C. Section 157 (1964 Supp.). Section 2 of the act provided for the creation of an arbitration board which was directed to decide questions raised in certain notices served by the railroads and brotherhoods relating to the use of firemen and train crew consists, and to make an award. Section 3 of the act is of greatest significance, and provides in pertinent part as follows:

"The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' and that portion of the organizations' notices of September 7, 1960, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters

on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration." (Emphasis supplied)

Thus, the attention of Congress was directed to the resolution of a labor dispute which was brought to a head by the notices served by the carriers that they would put into effect changes in existing work rules. *It was to these notices that all subsequent action, both by Congress and the arbitration board was devoted.* The notices to which the law refers purported to do one thing, i.e. to "eliminate all agreements, rules, regulations, interpretations, and practices, however established * * *" relative to the use of firemen in engine, yard and train service and to other matters of freight crew consist. Obviously, the rail carriers serving such notices have no attributes of sovereignty giving rise to powers transcending the authority of the states. Therefore, these notices were necessarily subject to the police power of the states, and the proposal to eliminate "all agreements, rules, regulations, interpretations, and practices" could relate only to those established previously under collective bargaining, and only in those areas in which no restraints of state full crew laws were in force. It is clear from the express language of Public Law 88-108 and the award in arbitration that this limiting concept prevailed throughout.

It should be beyond cavil that Congress, in the adoption of Public Law 88-108 was doing nothing more than establishing machinery by which an arbitration board of limited power and jurisdiction would undertake to dispose of specific issues raised by specific parties. The title of the Act is "Joint Resolution to provide for the settlement of *the labor dispute between certain carriers* by railroad and *certain of their employees*." The preamble to the law states that the intent is to settle two specific issues raised in the labor dispute "in a manner which preserves and prefers solutions reached through collective bargaining." In the body of the Act, Congress gave only this authority to the arbitration board, the authority to "make a decision * * * as to what disposition shall be made" of the carriers' notices and the organization notices and implementing proposals pertaining thereto. The scope of the board's deliberations was thus limited to issues raised by the parties to the dispute. Curiously enough for a national law, especially one now claimed to be a part of the "supreme law of the land", the arbitration board was ordered to "incorporate in such decision any matters on which it finds the parties were in agreement." The law limited the board's existence to a two-year period, absent "agreement otherwise", directed the board to make its award within 90 days, and provided for the expiration of the joint resolution authorizing the existence of the board after 180 days. The award of the board was merely to "constitute a

complete and final disposition of *the aforesaid issues* covered by the *decision* of the board of arbitration."

This law thus reveals three things beyond question. First, it was intended to be temporary. Secondly, it dealt only with two specific issues, i.e. conflicting notices filed by certain carriers and railroad brotherhoods; and thirdly, it was to affect only the parties to the labor dispute which brought about its existence.

Add to this two more incontrovertible facts. One, that the states having full crew laws were not in 1963 and are not now parties to the labor dispute which was before Congress for its consideration and, two, that the notices to which the congressional attention was confined could hardly have the effect of vitiating state law.

II. STATE LAW IS NOT SUPERSEDED IN ABSENCE OF MANIFEST INTENT

The issue of preemption of state law under the Supremacy clause is no stranger to this court. Consequently, there has evolved over the years a body of law setting out definite standards which must prevail before congressional supersession of state law will be held to have taken place. When reduced to essentials, the rule may be stated as follows: In the absence of a clearly expressed purpose to so do, Congress will not be held to have intended to prevent or supersede the exertion of state police powers in matters of health, safety and welfare.

A prior decision of the United States Supreme

Court, *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249 (1931) dealt specifically with the question of preemption of state full crew laws by congressional action. In that case, it was contended that the Arkansas full crew law was superseded by adoption of the Railway Labor Act and the 1920 amendments to the Interstate Commerce Act. In disposing of the issue, and upholding the state law, the court said at page 256:

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews. *Reid v. Colorado*, 187 U.S. 137, 148, 47 L. Ed. 108, 114, 23 S. Ct. 92, 12 Am. Crim. Rep. 506; *Savage v. Jones*, 225 U.S. 501, 533, 56 L. Ed. 1182, 1194, 32 S. Ct. 715; *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611, 71 L. Ed. 432, 438, 47 S. Ct. 207. * * *"

See also the significant case of *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943) wherein this court rejected the contention of the railroads that the Railway Labor Act and others had collectively preempted the field of state safety regulation when their subject matter became an issue in a labor dispute. The court held that a preemptive condition was not created by reason of a labor dispute being subject to mandatory arbitration.

There is a fundamental distinction drawn by the United States Supreme Court in preemption cases between those in which the state law alleged to be

preempted is a police power regulation and those in which it is not.

In *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), the court distinguishes several cases in which congressional action has been held to override state law. After reaffirming the rule that congressional intention to exclude states from exerting their police power must be clearly manifested, the court makes the following observation at page 749:

" * * * Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. *Maurer v. Hamilton*, 309 U.S. 598, 84 L. Ed. 969, 60 S. Ct. 726, 135 ALR 1347, *supra*, and cases cited. Here we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

In *Illinois Central R. Co. v. Public Utilities Commission*, 245 U.S. 493 (1918), the Supreme Court said at page 510:

"In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (Citations omitted)

On the question of congressional preemption, the court said in *H. P. Welch Company v. New Hampshire*, 306 U.S. 79 (1939), at page 85:

"Its purpose to displace local law must be definitely expressed."

This is the "manifest intent" rule stated time after time by this court. For additional citations to this rule, the court is referred to *Reid v. Colorado*, 187 U.S. 137 (1902); *Chicago, Rock Island & Pacific Railroad Company v. Arkansas*, 219 U.S. 453 (1911); *Atlantic Coast Line Railroad Company v. Georgia*, 234 U.S. 280 (1914); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Southern Pacific Railroad Company v. Arizona*, 325 U.S. 761 (1945); and *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947).

It has been further held that the mere simultaneous occupation of a field of commerce by both State and Federal governments does not afford grounds for preemption *DeVeau v. Braisted*, 363 U.S. 144 (1960), and that state law which does not frustrate the federal purpose is not preempted despite simultaneity of application. *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963). While preemption may occur where there is an inherent conflict in the terms or policies of federal vis-a-vis state legislation, we point out the caveat in *Huron Portland Cement Company v. Detroit*, 362 U.S. 440 (1960), wherein the court says at page 446:

"We conclude that there is no overlap be-

tween the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists.
* * *

It is notable that the Arkansas court, in arriving at its decision, placed great reliance on such cases as *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *California v. Taylor*, 353 U.S. 553 (1957), *Cloverleaf Co. v. Patterson*, 315 U.S. 148 (1942), and *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959). It must be noted that these (and other cases relied upon by the court) either did not relate to questions of health, safety or welfare, or alternatively represented holdings that the scheme of federal regulation was so pervasive as to preclude state action.

This court specifically observed in *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 297:

"We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce."

We note further that the basis for the court's decision in *Pennsylvania v. Nelson*, *supra*, was the prior decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941). The latter case, and *Cloverleaf Co. v. Pat-*

tersen, supra, were expressly distinguished in *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942). At pages 749-750, the court states:

"Furthermore, in the *Hines* Case the federal system of alien registration was a 'single integrated and all-embracing' one * * *. Here, as we have seen, Congress designedly left open an area for state control. Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (Cf. *Cloverleaf Butter Co. v. Patterson*, * * *) as to prevent Wisconsin under the familiar rule of *Pennsylvania R. Co. v. Public Service Commission*, 250 U.S. 566, 569, 63 L. Ed. 1142, 1145, 40 S. Ct. 36, PUR 1920A 909, from supplementing federal regulation in the manner of this order * * *."

Public Law 88-108 reflects no "single and all-embracing system" such as was held to exist in *Hines v. Davidowitz*, 312 U.S. 52 (1941) and later on in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The statute reflects no pervasive assertion of federal jurisdiction over the subject matter such as the court found in *Cloverleaf Co. v. Patterson*, 315 U.S. 148, (1942). We are thus left with the plain fact that the Arkansas court ignored the very explicit language of those cases we have cited herein in which the principle of supersession has been rejected by this court when traditional state police powers were at issue, in the absence of a manifest congressional intent that such be the result.

Not only is the absence of an express or necessarily implied (or manifest) intent to preempt state

full crew laws evident from the act itself, this point is conceded by the United States District Court of Arkansas in the case here under review. It is important to note the above concession. The majority of the court states (239 F. Supp. 1 at page 20) :

"In the instant action, although the enabling legislation itself might be said to contain no language which manifests a congressional intent that the proposed Arbitration Board and the award made pursuant to the authority and direction of the statute preempted or occupied the field, the fundamental consideration is its implementation and its practical application
* * *"

In view of the final decision of the court, if there had been any possible way to find express or implied legislative intent to preempt state full crew laws, the court surely would have done so. However, conceding that there was none, the court felt compelled to construct an "actual and apparent conflict" between Public Law 88-108 and the Arkansas full crew law with which it was dealing. We will demonstrate hereafter that the court erred in this regard.

The Arkansas court applied a presumption that acts of Congress are intended to apply uniformly. From this it reasoned that because Congress did not expressly state that operations subject to full crew laws were excluded, they must have been intended to be included, and on this basis holds preemption. Such a conclusion runs counter not only to the legislative history of Public Law 88-108, but also is contrary to the long and honored line of U. S. Supreme Court cases set out heretofore.

III. THE LEGISLATIVE HISTORY OF PUBLIC LAW 88-108 MILITATES AGAINST A FINDING OF PREEMPTION

It has been demonstrated that nowhere in the language of the act itself can there be found a specific and express intention on the part of Congress to preempt state full crew laws. Nor will the suggestion that such intent may be fairly implied from the legislative history stand the light of day. Indeed, the history of this law reveals a contrary intention, and even the railroads conceded at the time that preemption would not occur.

Senate Report No. 459, which submitted Senate Joint Resolution No. 102 for congressional action reads in part as follows:

"The joint resolution reported by the committee is designed to resolve the current dispute. That is, the dispute engendered by the filing by certain carriers of notices on November 2, 1959, and the filing by the operating brotherhoods of notices of September 7, 1960. This proposal is not and cannot conceivably be considered as a precedent for the railroad industry, the transportation industry generally, or for any other labor-management dispute. It is what it purports to be—a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." *U.S. Code, Congressional and Administrative News, 88th Congress, 1st Session, 1963, p. 837.*

No less revealing of the intent of Congress was the manner in which the House of Representatives' counterpart of the bill was reported out of commit-

tee. At page 14 of House Report No. 713, it is expressly stated:

"The Committee does not intend that any award made under this Section may supersede or modify any state law relating to the manning of trains."

What more could Congress do to disclaim preemption? The law it passed contained no express preemptive language. The authoritative legislative history describes the act as a "one-shot" effort to reach "settlement" of a "labor dispute" between "carriers" and "certain of their employees." The Senate Committee expressed a desire to avoid the "obvious dangers of repeated congressional intervention" into labor-management disputes and further imposed a distinct expiration date to "closely limit the scope and impact of the resolution" in the event no mutual agreement could be reached by the parties. The position of the House Committee report was restated by the chairman of the House Committee on Interstate and Foreign Commerce, in the course of debate. (Congressional Record, Vol. 109, Part 12, P. 16122).

A corollary to the "manifest intent" rule is the rule that state public safety and health regulations will not be superseded when Congress demonstrates any "hesitancy." *Maurer v. Hamilton*, 309 U.S. 598 (1940). In the instant case, a great deal more than mere hesitancy has been shown. There is specific disclaimer of intent to preempt. The

statutory purpose was clearly not the displacement of state full crew laws.

At the time of passage of Public Law 88-108 no one—not even the railroads—contended that its adoption would have a preemptive effect. This is shown by a document entitled “Supplemental Rebuttal Statement for the Carriers in the Matter of a Dispute Between Certain Rail Carriers and Five Railway Labor Organizations Involving Rules and Practices Governing the Use, Compensation, and Assignments of Railroad Operating Employees.” The particular document may be found in *Hearings before the Committee on Commerce, United States Senate, 88th Congress, First Session, on S. J. Res. 102*, at page 707. It was a statement by the carriers to the effect that even with the adoption by Congress of Senate Joint Resolution 102 in its original form, the carriers could not discharge 25.9% of the firemen in the full crew law states and 50% of the “unneeded trainmen and switchmen” because they would be kept from doing so by the state full crew laws. The statement reads in pertinent part:

“1. A study made by the carriers indicates that 25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the States of Arizona, Arkansas, Indiana, Louisiana, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Texas, Washington, and Wisconsin; and that approximately 50 percent of the redundant positions occupied by unneeded trainmen and switchmen

are protected by the laws of these States and those of California, Maine, and Mississippi. In these States, even when redundant employees are removed from the working lists through natural attrition, new unneeded employees must be hired to fill their positions * * *

Thus not even the carriers themselves were contending that the adoption of Senate Joint Resolution 102 upon which Public Law 88-108 was based, would result in preemption of the state full crew laws.

IV. THE ARBITRATION BOARD CREATED UNDER PUBLIC LAW 88-108 SPECIFICALLY DISCLAIMED ANY ATTEMPT TO SUPERSEDE STATE LAW

The position taken by the arbitration board in interpreting its own powers under Public Law 88-108 is worthy of considerable attention. Critical examination of the award itself does not indicate any purpose on the part of the board to affect state laws providing for the manning of locomotives or trains. The board was directed by statute to provide a solution to a labor dispute involving specific parties, and as to certain specific issues, i.e. those raised by conflicting notices on crew consist. Its attention was confined to these issues as between these parties, and there was no suggestion that state full crew laws were to be affected in one way or another.

It is clear that the board was dealing only with the demands of rules and practices established by agreement and custom, and not with the requirements of state full crew laws. This intent is demon-

strated in the opinion of the neutral members of the board with regard to the firemen issue in which the following appears:

"On its face this procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it would not have such an effect is due to three reasons. First, * * *. Second, a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service. * * *" 41 LA 690. 43

On the train crew consist issue, the board very specifically stated that it was not formulating any national policy or rule. The court is respectfully referred to the following statements of the neutral members:

"It is apparent to us that the consist of crews necessary to assure safety and to prevent undue work loads must be determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic. Some yard service crews, for example, now consist of one foreman and one brakeman, while others consist of one foreman and as many as ten brakemen. The variation depends on a great complex of factors, reflected by the guidelines mentioned below. Though the range is less pronounced in road service, it also makes unfeasible a definite national rule.

"* * *

"Finally, although the most prevalent crew consist, in other than passenger service, is a conductor (foreman) and two brakemen (helpers), this fact provides the basis for only the most tentative generalizations. It does not justify a

national rule establishing this as the minimum consist ratio." 41 LA 694-695.

Relating to the same point, it must be noted that the board recognized its own limitations when it stated at 41 LA 680:

"We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from congress, *the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement.* There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview." (Emphasis supplied)

The importance of this language should not be underestimated. It is obvious that the parties to a labor dispute, whatever character the dispute might take, could not take action themselves to supersede state law. What the parties themselves could not do, the board was not constrained to do.

As pointed out with reference to the legislative history of Public Law 88-108, it was the function of the board to furnish an ad hoc settlement of particular points which had formed the subject matter of a dispute between certain railroads and operating employees. The answer was calculated to be temporary unless extended by mutual agreement of the parties. The board did not feel itself empowered to answer questions of "general social policy,

community action, or legislation" but left these items to the appropriate elements of government charged with the responsibility of weighing them.

V. THERE IS NO IRRECONCILABLE CONFLICT BETWEEN PUBLIC LAW 88-108 AND STATE FULL CREW LAWS

The basic question on preemption is always congressional intent with respect to it. Preemption therefore may often be decided one way or the other from clear clues on such intent in the language of the federal act itself or from what the legislative history discloses. In the present case these two guides should prove sufficient.

Especially when such language and history are not revealing, it is necessary to resort to a third correlative criterion, that of direct or irreconcilable conflict between the federal and the state statutes. Consideration of irreconcilable conflict may not become necessary in a clear case, but the fact that the Arkansas U. S. District Court decision was rested largely upon it requires that this criterion be separately examined. Such a criterion must not be blown up into a principle of accidental or unintentional preemption. If Congress does not intend federal preemption, it will not occur.

The majority of the lower court felt that there was an "actual and an apparent conflict because of and demonstrated by the identity of the subject matter" (239 F. Supp. 1, 20) and "by the application and implementation of the state and federal

statutes which attempt to govern the same conduct". (239 F. Supp. 1, 24) Here, we respectfully submit, the main question was begged rather than examined. The specific claim that "none of the parties can comply with both the state law and the Arbitration Award" (239 F. Supp. 1, 24), only begs the question in another way. The lower court makes no further effort to demonstrate a conflict except in its references to a "national scheme of regulation" contained in Public Law 88-108 and to "the unambiguous national policy evidenced" in the statute. (239 F. Supp. 1, 26) One infers that the court believed that Congress had set up machinery which would inexorably determine whether firemen were to be employed and the number of trainmen to be employed on all types of trains and switching operations and in all states.

Sometimes the problem in determining whether there is irreconcilable conflict between national law and state law lies in determining to what each applies. This is the type of situation with which we here deal. There is no difficulty in knowing to what the Arkansas statute applies. It applies to the makeup and size of engine and train crews on certain freight trains operating in the State of Arkansas and to the makeup and size of switch crews within certain cities in Arkansas. We submit that the federal Arbitration Act, Public Law 88-108, and the Arbitration Award made pursuant to it do not apply to the operations of such freight train crews or such switch crews in Arkansas. Therefore there

is here no direct conflict between national law and the state law.

It is at times difficult to determine whether the national law and the state law apply to the very same subject matter, to the very same specific conduct or event. It was difficult in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). The majority thought the regulation of the federal Secretary of Agriculture did not apply to the distribution and sale of Florida avocados in California. The minority thought it applied to the marketing of Florida avocados in all states. The majority therefore found no irreconcilable conflict with a California statute which related to the sale of avocados in California, while the minority found the conflict to be present. The fact that "the California statute and the federal marketing orders embody different maturity tests" did not establish that there was an irreconcilable conflict. That, as the majority said, "poses rather than disposes of the problem before us". So in the present case, the fact that Public Law 88-108 has established a scheme resulting in an Arbitration Award relating to the use of firemen on freight trains and to road and yard train crew consist, which may eventuate in decisions or agreements on makeup and size of crews differing from the provisions of the Arkansas statute on these matters, only poses the problem.

The different conclusions reached by the majority and the minority in *Florida Avocado Growers*

on whether the federal marketing order applied to the marketing of Florida avocados in California turned essentially upon disagreement as to whether Congress gave the Secretary of Agriculture power to decide and whether he did in the exercise of that power determine that Florida avocados passing certain standards established by him could be marketed in California. How far did the Secretary's order reach? No farther, thought the majority, than to cover the picking, the processing and transportation of agricultural commodities; stopping short of distribution and sale to consumers. Marketing, the majority argued, is traditionally a subject of state control. The federal statute does not show a comprehensive congressional design with respect to retail distribution. It relates rather to temporary relief to growers suffering from adverse economic conditions, a problem allowing for widespread regional variations. Not so, said the minority, the federal order applies even to the ultimate marketing of the product to consumers. Congress intended a comprehensive and pervasive regulatory scheme on maturity and quality of agricultural commodities, establishing uniformity in quality standards, including uniformity at the market-end of the flow of commerce.

The basic question on conflict is similar in the present case. How far do the congressional statute and the Arbitration Award extend? Do they cover certain freight trains and other switching operations which are already regulated with respect to

crew makeup and number by local state safety statutes? Or do they apply only to railroad operations in states without full crew laws and to the operations in states with such laws which are not governed by such full crew statutes?

There is little difficulty in seeing that the federal statute and the award in the present case stop short of application to transactions covered by the state statutes which it is claimed are preempted. In the language of the cases, there is no identity of the subject matter to which both the federal regulation and the state regulation apply. Compliance with both is not a physical impossibility. The state statute applies to a phase of the general subject matter of railroad operations not reached by the federal law or the federal Arbitration Award. The majority found that both the federal and state regulations in *Florida Avocado Growers* might be observed and enforced even though some Florida avocados lacking 8% oil content would be stopped at the state line. In the present case any interstate train approaching Arkansas without a full crew stops at the line only to add enough men to come up to the state requirements.

The full purposes and objectives of Congress in the enactment of Public Law 88-108 did not encompass a determination as to whether firemen should or should not be employed on trains and switching operations subject to state law requirements on these matters in some states. Nor do the congressional

purposes and objectives encompass a determination of the proper size of train crews in operations as to which state laws already have spoken. This being so, the Arkansas full crew law does not stand as an obstacle to the accomplishment of the purposes and objectives of Congress.

To determine the soundness of the propositions just stated, one looks principally to the federal statute and to the legislative history. Previously these have been examined to see what light they throw directly on the question of congressional intent to supersede state law. Now, in this case relating to state laws in effect at the time of the congressional enactment, we reexamine the same two general areas to see whether Congress intended the federal statute and award to apply to the particular train operations and switching on which state laws on the need for firemen and on the size of train crews have already established rules.

Let us look first to the statute itself. Congress has established in the statute no uniform national plan on the need for firemen and on the number of trainmen. It has not spoken at all on the merits of these issues. Nor has Congress said that any such plan, if one such were to be devised by its creature board, is to apply to all railroads or to certain railroads in the country (including such of the operations of those carriers as are governed with respect to the hiring of firemen and size of train crews in some states by full crew laws). To the

contrary, Congress has sought only to provide for the settlement of the labor dispute between certain railroad carriers and their affected employees arising out of certain notices given by those carriers and by the unions representing certain of their employees. Because this particular dispute threatened essential transportation, Congress, as an emergency measure, forbade any strike or lockout arising out of it and set up an arbitration board consisting in the traditional fashion of equal numbers of employer and union representatives and additional members to be chosen by the ones first named or if there were no agreement by the President of the United States.

Nor is the Arbitration Board itself given any authority or power to establish a uniform and pervasive plan with respect to the employment of firemen and the size of train crews applicable to all or some railroads or to certain railroad operations (including those in some states which are governed as to these matters by full crew laws). The only authority delegated to it is the authority to make a *decision* on the disposition to be made of the issues made by the parties in their notices. Such issues could not encompass the repeal or amendment of state full crew laws. Just as the agreement of the parties could not have been in conflict with such state laws, so the decision of the board could not be. If it were it would be outside and beyond the issues made by the parties.

Does anyone seriously contend that Congress would delegate to an ad hoc temporary arbitration board of private citizens the power to establish a national policy uniformly applicable on matters of such importance as engine and train crew consists?

The award was not described in the statute in vague or general terms. It was spoken of in specific and limited fashion as constituting a complete and final disposition of "the aforesaid issues" made by the parties in their notices.

This statute shows no determination by Congress that there was a need for national uniformity on the use of firemen or on the number of men in train crews. The board was merely to make an arbitrator's decision on the issues, not to make a uniform rule. The decision was required to incorporate any matters on which the parties were in agreement.

There are also reasons constituting general noticeable knowledge tending to show that the federal statute does not establish nor provide for establishment of a uniform national policy on all operations of all carriers. The general subject of engine and train crew consist is not one which has ever had federal supervision. It is one which has always been regarded as properly of local concern. There is nothing in the essential nature of the problem demanding or admitting only of national supervision. Indeed, the history of this dispute and of this legislation shows neither the parties concerned,

nor the executive, nor the legislative authority to be even requesting exclusive and pervasive uniform federal regulation.

The statute contains other indicia that no comprehensive uniform federal regulation was contemplated. The statute itself was temporary. Its life has long ago expired. The statute limited the force of the award to a two-year period, absent other agreement of the parties.

The legislative history tells the same story as the words of the statute on the intent as to covering the same subject matter as state full crew laws in such a way as to produce a direct and irreconcilable conflict. The Senate report on the resolution (Senate Report No. 459) described its subject matter as a one-shot solution of a particular labor dispute imperiling the economy and security of the Nation. It said that the Act was not a precedent for the railroad industry or for any other labor dispute. It stated that the Senate Committee had imposed the two-year limit on the effect of the award "in order to closely limit the scope and impact of the resolution". A paragraph of House Report No. 713 deals with "NONPRECEDENTIAL EFFECT OF LEGISLATION".

The understanding of the Arbitration Board that it was not establishing any rule or procedure which would apply to operation subject to full crew laws has been elaborated in an earlier portion of this brief.

In *Florida Avocado Growers* the regulations issued by the Secretary of Agriculture relating to the dates of packing and shipping and the sizes of avocados grown in Southern Florida definitely settled the tests of maturity of such avocados. The making by the Secretary of such regulations as to quality and maturity of agricultural products was expressly authorized in the federal statute. In the present case the award merely gives the individual carrier parties "the right" to give the unions a list of the engine crews which in the carrier's judgment do not require the services of a fireman. It is entirely up to the carrier whether it wishes to give a list. Its judgment on what it puts on the list is discretionary.

On the union side also, what happens next under the award depends upon the action or inaction of particular persons who merely have the right to designate as requiring firemen 10% of the crews listed by the carrier. Even then the carriers may use firemen on the undesignated crews if they wish. The award nowhere prohibits carriers from using firemen.

On the train crew consist issue, the award establishes nothing at all in the way of a national rule or national practice. Essentially it simply remands the issue to local negotiation. Local negotiation will never occur, however, unless requested by a party. Again, special arbitration boards of adjustment are not set up except upon demand.

The group of private citizens who have played any governmental role which may be present in this plan have not provided any definite rule. There is no attempt here to establish a federally sanctioned uniform or pervasive plan on the need for firemen or on the size of train crews. The only thing provided is the possibility of rules for each carrier party to the dispute.

We submit that there is no irreconcilable conflict between the federal statute and award and the state law.

CONCLUSION

The State of Washington enacted its full crew laws in 1911. Since that time these laws have been successfully administered in the interest of the public safety. The legislature of this state is not presumed to act arbitrarily, nor is the Congress of the United States. Can it be, then, that Congress can be presumed to have accidentally preempted long standing state law by the enactment of temporary, stop-gap legislation creating a board of limited existence and powers, and leave thereby a gaping chasm where once existed traditional and long-established police regulation?

We have demonstrated in the course of this brief that Congress disclaimed any such intent in the legislative history of Public Law 88-108. The arbitration board similarly disclaimed any such power, and even the railroads, in their testimony be-

fore Congress on the resolution upon which Public Law 88-103 was predicated, admitted that it would have no preemptive effect. We have further demonstrated that there is no conflict between state and federal law upon which supersession of state law can be justified.

The pendency of a similar action in the Federal courts in the State of Washington makes the issue now before the court one vital to the interest of the people of this state. We urge that this court reverse the decision of the Arkansas court, and applying the principles set forth in the long line of cases herein cited, uphold the authority of the states to regulate in the interest of the safety of all its citizens.

Respectfully submitted,

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REPORT OF THE
COMMISSIONER OF THE
BUREAU OF REVENUE

For the year ending June 30, 1900

The following is a summary of the receipts and disbursements of the Bureau of Revenue for the year ending June 30, 1900:

Receipts: \$1,000,000.00

Disbursements: \$950,000.00

Balance on hand, July 1, 1900: \$50,000.00

Total: \$1,050,000.00

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Balance on hand, July 1, 1900: \$50,000.00

Total: \$1,050,000.00

IN THE
SUPREME COURT OF THE UNITED STATES

Nos. 69 & 71 (Consolidated)

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
ET AL. _____ *Appellants*

v. No. 69

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, ET AL. _____ *Appellees*

and

ROBERT N. HARDIN, PROSECUTING ATTORNEY
FOR THE SEVENTH JUDICIAL CIRCUIT OF
ARKANSAS, ET AL. _____ *Appellants*

v. No. 71

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, ET AL. _____ *Appellees*

ON APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF ARKANSAS

BRIEF OF AMICI CURIAE

OPINION BELOW AND OTHER FORMAL REFERENCES

Both the majority and dissenting opinions of the district court styled as *Chicago R. I. & Pac. R. R., et al., v. Hardin, et al.*, are reported at 239 F. Supp. 1 (E. D. Ark. 1965). Probable jurisdiction was noted and these appeals were consolidated on June 7, 1965.

The amici curiae adopt the references to the jurisdictional aspects, the Federal and State Statutes involved as well as the Constitutional provision which are the subject of this litigation as set forth in the brief submitted by the several appellants.

QUESTION PRESENTED

The sole question treated by the amici curiae is whether the Congress of the United States by enactment of Public Law 88-108 either intended to occupy or so occupied the subject of railroad crew consists as to preempt and deprive the respective states of their authority to legislate matters of safety by means of minimum crew schedules.

STATEMENT OF AMICI CURIAE

This brief is submitted to the Court in behalf of the States by their respective signing Attorneys General pursuant to Rule 42(4) of the United States Supreme Court.

The States joining herein include some of but is not limited to, those which have legislation similar to that of the State of Arkansas which is the subject of this litigation. It is understood by the amici curiae that

at least one interested State has previously submitted and perhaps others may subsequently offer individual comment to this Court.

This participation in this case by the signatory States does not infer, and it is not argued, that the Arkansas statutes are justified, economically sound, or feasible, since no evidence was permitted on this issue during the proceeding in the court below. *Cf. Pennsylvania R. R. Co. v. Driscoll*, 330 Pa. 97, 198 A. 130 (1938) and 336 Pa. 310, 9 A. 2d 621 (1939). This brief is thus limited to the broad concept and balance of our federated system of government and seeks merely to offer support to the proposition that safety regulations in the form of minimum railroad crew laws are an established legitimate area of State interest, and that pre-emption of such state statutes by federal law is not favored. *Missouri Pac. R. R. v. Norwood*, 283 U.S. 249 (1931) and 290 U.S. 600 (1933).

It is the conclusion and judgment of the amici curiae that where, as here, there was no expressed intent of Congress and Public Law 88-108 is not so comprehensive as to virtually occupy every facet of the field, this Court should hold, consistent with its previous decisions, that the states' authority has not been superseded.

SUMMARY OF ARGUMENT

I

The Police Power Authority of the States Occupies a Preferred Status.

It is well established that states possess the authority to legislate for the health, safety and welfare of their citizens as a legitimate exercise of inherent police power. *Terminal R.R. Ass'n. v. Brotherhood*, 318 U.S. 1 (1943). This power is qualified by a criteria of reasonableness and must not run afoul of or conflict with constitutional provisions or prohibitions. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). In this composure, many states have enacted statutes governing the minimum composition of railroad crew consists. These laws are under constant surveillance by both the public and the legislatures. Such statutes undergo alteration or repeal and re-enactment when the circumstances are demanded and justified. In no instance have the states attempted to establish absolute crew compliments, but leave to railroad management or traditional collective bargaining the ultimate determination of road, yard or switching crew composition in excess of statutory schedules.

It is conceded the Congress may validly exercise complete dominion over a subject of interstate commerce, but the statutes under attack here bear judicial approval. *Chicago R.I. & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453 (1911); *St. Louis, I.M. & S. Ry. v. Arkansas*, 240 U.S. 518 (1916); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931) and 290 U.S. 600 (1933).

The legislative bodies of the several states are peculiarly able and purposely adapted to express the will

and needs of their people by the enactment of proper and remedial legislation.

The laws of the states are clothed with a presumption of validity and on review the courts should not be concerned with the wisdom or expediency of the statute, but should confine their examination to the narrow constitutional issues. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). In the event that federal and state enactments may apparently conflict, every effort should be made to reconcile the two together. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

The authority of states is vitally necessary to maintain our treasured system of government and anything which results in deprivation of that power, no matter how small, should be critically reviewed.

II

The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.

It is too clear to be arguable that the goal sought to be accomplished which compelled the drastic action of compulsory arbitration was avoidance of a nationwide strike which would have crippled the national economy. In drafting Public Law 88-108, every effort was made by Congress to circumvent a conflict with state enacted minimum crew consist laws. Only the real source of difficulty, the notices of proposed changes in work rules, was ever identified. Public Law 88-108, § 3; R. 77.

If it had been the purpose and objective of Congress to secure an absolute uniform national scheme to super-

sede state statutes and regulations, then most reasonably, interested and vital state officers, commissions or agencies would have been consulted. Moreover, no adequate special studies were made of unique problems existing in the several states.

The legislative history is decidedly in favor of the proposition that state crew statutes were to remain in force and effect. See Hearings on H. J. Res. 565, 88th Cong., 1st Sess. 78; S. J. Res. 102, 88th Cong., 1st Sess. 400. In absence of a clear manifestation, pre-emption will not be implied. *Schwartz v. Texas*, 344 U.S. 199 (1952); 1 *Southerland Statutory Construction*, § 2026.

The Award is only binding on the parties. *In Re Certain Carriers*, 229 F. Supp. 259 (D.C.1964). But no state was invited or participated in the negotiations. Excluding the decision of the district court in this case, there is no judicial determination known which holds that arbitration between unions and management nullifies state statutes and is binding on a state.

III

There Is No Genuine Conflict Between Public Law 88-108 and State Enacted Minimum Crew Requirements.

The supremacy of federal legislation is not invoked unless there is a clear manifestation of legislative purpose to supersede state law. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). If the federal act is so comprehensive as to be incompatible with local law, then conflicting state statutes which would frustrate

the purpose of the federal legislation are superseded.
Local 20 v. Morton, 377 U.S. 252 (1964).

There is no irreconcilable conflict between the Award and the Arkansas statutes for the spirit of the Award does not prohibit the employment of additional trainmen that might be required by state statutes or the desire of railroad management.

ARGUMENT

I

The Police Power Authority of the States Occupies a Preferred Status.

It is a long established and fundamental concept that a state may legislate for the health, safety and welfare of the general public as a legitimate exercise of its inherent police power. *Reid v. Colorado*, 187 U.S. 137 (1902); *Terminal R.R. Ass'n v. Brotherhood*, 318 U.S. 1 (1943). It may be properly presumed that without exception every state has entered and enacted regulations in a multitude of fields cognizant of their responsibility and obligations to their citizens. See 16 Am. Jur. 2nd, *Constitutional Law* §§ 259 et seq. for cases and annotations. This authority is qualified, of course, by a criteria of reasonableness and must not run afoul of or conflict with constitutional provisions and prohibitions. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Savage v. Jones*, 225 U.S. 501 (1912).

It need not be emphasized that many states have enacted various safety regulations and particularly have passed minimum crew laws governing the railroad industry. Several such statutes have recently met judicial approval. *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S. 2d 76 (Sup. Ct. 1965) (McKinney's Consol. Laws N.Y. Book 48, §§ 54-a, 54-b, 54-c (1954); *Chicago & N.W. Ry. v. LaFollette*, 135 N.W. 2d 269 (Wis. 1965), Wis Stats. §§ 192.25(2), (4), and (4a); *Radrizzi et al. v. Louisville and Nashville R.R. Co.*, No. 51172, Illinois Commerce Commission, July 30, 1965 (Illinois Public Utilities Act, § 57).

In some instances, the legislatures have delegated this authority to regulatory commissions and agencies. E.g., Ill. Rev. Stat. 1963, Ch. 111 2/3, par. 61. Even at this time there are perhaps a dozen states that have some form of minimum crew consists enactments.

As might be reasonably assumed, just as other laws require continued scrutiny and supervision, these statutes and regulations directed to the safe operation of railroad traffic undergo alteration and repeal as circumstances and conditions demand. Repealed Miss. Code Ann. §§ 7769-61. The Nebraska legislature repealed full crew requirements on July 26, 1965. In some few instances, the electorate of the states has by popular vote enacted, repealed or retained full crew statutory provisions. As recently as the last general election, North Dakota adopted an initiated measure repealing full crew statutes. Initiated Measure No. 3, North Dakota Stats. Chap. 469. The people of Claifornia took similar action. Deering's Calif. Labor C.A. § 6901-10. On the other hand, Arkansas has rejected an effort to abolish its statutes. Initiated Act No. 1, 1958; *Hope v. Hall*, 229 Ark. 407, 316 S.W. 2d 194 (1958).

While considering this facet of state involvement, it is imperative to keep foremost the fact that the state laws and regulations are directed solely to minimum requirements deemed necessary for the safety and welfare of both the railroad employees and the general public. See Exhibits "A" and "B" to complaint, Act 116 of 1907 and Act 67 of 1913, R. 22 and 23. They leave for railroad management or traditional collective bargaining negotiation the ultimate determination of road, yard or switching crew composition in excess of the statutory schedules.

It is not argued, but rather conceded, that the Congress of the United States in its discretion may validly exercise complete authority over a subject of interstate commerce. *Gibbons v. Ogden*, 9 Wheat. 1 (1824); United States Constitution, Art. I, § 8; *Virginia Ry. v. Federation*, 300 U.S. 515 (1936). But this proposition only confirms the theory and argument offered by the amici curiae. The different provisions of statutes, the many judicial pronouncements and other matters prominent in the history of minimum railroad crew requirements have not resulted from zealous legislatures or careless tribunals. On the contrary, the propriety and validity of governmental regulations are founded upon compelling logic and reason which have been critically surveyed from every corner and defies criticism. Here, both of the Arkansas acts under attack bear the seal of prior judicial approval. *Chicago, R.I. & Pac. R.R. Co. v. Arkansas*, 219 U.S. 453 (1911); *St. Louis, I.M. & S. Ry. v. Arkansas*, 240 U.S. 518 (1916).

The right to legislate and govern was placed in each sovereign state as a primary doctrine fostered by the wisdom of the founders of this Nation. It was recognized that each geographical and political area was best able to diagnose and prescribe for its own ills. In this context, there is perhaps no better analogy than the railroad minimum crew law. It is remarkable that at least one state, Hawaii, and some territories such as Guam and the Virgin Islands do not have any railroads. Other states have but one main line with little traffic, while still others may have their entire economy bound by an immense railroad complex of traffic and mileage. Severe or moderate weather may be a substantial factor of consideration. Both terrain and the density of population deserve prominent attention. Even past evils, deaths and disaster

may prompt governmental inquiry and legislative action. As stated previously, safety to the railroad employee and for the general public must each be weighed, but on separate scales. Except as a collateral matter, the states are not persuaded by annual profits or the number of jobs in the railroad industry. Rather, the general welfare of the entire community is the compelling accomplishment which is sought. In all of these matters of consideration mentioned and others too numerous to relate, the legislative bodies are peculiarly able and purposely adapted to investigate, be knowledgeable, and competent to express the will of their people and enact proper and remedial legislation. It is against this background that both the state and federal judiciaries have adhered to the principle that enactments of the legislature are presumed to be valid and have strived, in the event of two apparent conflicting statutes, to construe them in *pari materia*. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

Also, when viewed in this perspective, it is understandable that the courts have properly refrained from evaluating the wisdom or expediency of the statute under review, and have confined examination to the narrow constitutional issues. Cf. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

The rights and authority so necessary to the continued vitality of our unique and treasured dual system of government, nurtured to maturity by time tested principles, should not be eroded away, much more forfeited, on the anemic grounds offered by the district court. State authority should be permitted to stand undiminished as a citadel of local law enacted or repealed by the people and the communities that are greatest affected.

II

The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.

The circumstances and conditions which compelled the action of the President of the United States to deliver the message on July 22, 1963, concerning the railroad-labor dispute, and the events subsequent thereto, were meticulously reviewed in the opinion of the court below (R.239-248). For the purposes of this brief, that history can be accepted, but necessarily the conclusions reached are rejected. More important, the circuitous route negotiated by the majority of the district court is challenged as failing to survive close scrutiny. Without reiterating the extensive findings and events, a resume of those most significant matters which culminated in the National Award is beneficial.

It is too clear to be misinterpreted that President Kennedy was compelled to recommend drastic action, in the form of compulsory arbitration, by the unfruitful and disappointing efforts failing to resolve a labor dispute of national magnitude and importance (Pl. Ex. 3, R. 43-45). The singular purpose sought to be served was avoidance of a nationwide strike which would have paralyzed or at least crippled the entire national economy (R.45). It was suggested that:

“ . . . for a 2-year period during which both the parties and the public can better inform themselves on this problem and alternative approaches — interim work rule changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modi-

fication to the Interstate Commerce Commission . . . " (R.48).

Without belaboring this aspect further, it may be unequivocally stated that the tenor of the objective remains as initially established and no variation or alteration can be discerned by subsequent events. Hence, that which precipitated this unique scheme was consistent with the attainment of equitable and enforceable rules.

One important revision of the mechanics of operation was made by the Congress which is pertinent to this litigation. To avoid any possible conflict with state enacted full crew statutes which would have been susceptible to cancellation when confronted with the Interstate Commerce Commission, all reference to the I.C.C. was withdrawn and substituted in its stead was submission of the dispute to an arbitration board (Pl. Ex. 3, Public Law 88-108, § 2, 77 Stat. 132; R.76-78). The command was concise and unambiguous. The board consisted of seven members. The representatives of the carriers and the brotherhoods, each named two persons who jointly, in turn, selected three additional members.

At this juncture it is imperative to note that neither the statement of the President nor the final enactment of Public Law 88-108 contained any language that dictated, or even suggested, abolition of state enacted minimum crew laws. Only the real source of difficulty, the notices of proposed work rules changes, were identified. (Public Law 88-108, § 3, R.77).

It is apparent from the record in this case that no state official participated or was appointed to the Board. (Pl. Ex. 4A, Arbitration Board No. 282; R.80-95). Furthermore, it seems also apparent that no state officer,

commission or agency was ever consulted. No special studies were made of peculiar problems existing within a geographical or political area, and no effort was made to determine possible effect on particular industries, or economies. All data, memoranda and material was furnished by the Secretary of Labor. (Public Law 88-108; § 3; R.77). In fact, only one railroad yard was visited and that was for the purpose of orientation (R. 81). These comments are not directed as a criticism of the Board, for it was not concerned with local or merely sectional problems. To be sure, this could not be accomplished within the ninety day limitation imposed by Congress (Public Law 88-108, § 5; R.77). The Board was only concerned with the gigantic problem of properly arbitrating the differences between railroad management and the unions.

If it had been the purpose and objective of Public Law 88-108 to furnish an absolute national scheme to supersede state statutes and regulations, then most reasonably, interested and vital state commissions, agencies and departments would have been consulted. Thus, from this point alone, it appears entirely clear that the Board was too ill-equipped and uninformed to accomplish any more than resolution of a severe labor-management conflict.

A satisfactory answer is not found by the retort that special boards of adjustment were appointed to consider unique problems. These inquiries were not primarily constituted on a basis of health, safety or welfare of the public or the employee, nor were the special boards related in an adequate degree to the problems of dangerous grades, crossings or other persuasive circumstances. In the instance under consideration, three special boards, all composed of the same three members, were concerned

with a huge geographical area. (Pl. Ex. 5; R.174-202). Of this, only mention was made of a switch yard in Paragould, Arkansas (R.182-185), and the fact that a yard at Little Rock was automated (R.199). Such perfunctory treatment is hardly an answer to the question of safety in Arkansas. The other states affected also demand prompt and reasonable response. It cannot validly be presumed that, with the exception of Paragould and Little Rock, Arkansas, the balance of the state is consistent with the national equation of safety. The Rocky Mountain States cannot be logically compared with the Eastern Seaboard any more than the Southwestern States have any physical relation with the West Coast. These are patent fallacies which require the conclusion that except for the most general guides for safe railroad operation, it was thought that all special problems would be left, as had been before, in the capable hands of the respective state governments.

Perhaps most indicative of all, there exists in the Award those provisions granting railroad management certain discretion to fix the size of the crews in excess of the prescribed minimum. Likewise, the local union chairman is granted authority to add additional crewmen not to exceed ten per cent in excess of the Award (Award, II B(2); R.83). Nowhere is there heard the voice of the general public and no mention is made of any discretion given to local government. Perhaps the latitudes provided management and labor can adequately be described as gratuities, but little comfort can be gleamed where there is only a happenstance relationship to safety. This points up once again, most forcibly, that Arbitration Board No. 282 was only seeking to compromise and revise work rule difficulties rather than supplant the various state regulations and statutes.

The legislative history appears to be decidedly in favor of the proposition that the state statutes were to remain in full force and effect. See Hearings on H.J. Res. 565 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. 78; Hearings on S.J. Res. 102 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. 400. There are a few expressions that can be found to the contrary. Hearings H.J. Res. 565, 88th Cong., 1st Sess., pp. 111-114; Hearings before Senate Committee on Commerce on H.J. Res. 565, pp. 400-401. Notwithstanding that a controversy may have existed as to the implications of Public Law 88-108, in the absence of clear language, pre-emption is not implied. *Schwartz v. Texas*, 344 U.S. 199 (1952); 1 Southerland Statutory Construction, § 2026.

It was insisted by the appellees before the court below that safety was an expressed factor to be considered by the Arbitration Board (Award; R.82). Perhaps the Board did abide by this admonition, but it must be recognized that local factors and conditions were so varied that it would be indeed fanciful, in absence of some expression of direction, to conclude that the Board seriously entertained the thought, much rather embarked on a program, to occupy every facet of local full crew requirements.

The comments of the members of the Board, made a part of the record on appeal support the conclusion that state laws were not the target of their efforts.

It must be kept foremost that it was the "anachronistic" work rules, not full crew laws, that were the source of dispute and condemned by the majority of the Arbitration Board. Uniformity may be a desirable foundation for collective bargaining arrangements, but the superior dictates of safety cannot be made a slave of unanimity.

Section 3 of Public Law 88-108 provides that the Award is only binding on the carriers and unions. When the validity of Public Law 88-108 was attacked, its application was easily defined, and it was determined constitutional in all respects. *Brotherhood of Locomotive Firemen v. Chicago, B. & O. R.R. Co.*, 225 F. Supp. 11 (D.D.C. 1964), Affmd., 331 F. 2d 1020 (D.C.Cir. 1964), cert. den., 377 U.S. 918 (1964). Thereafter, in the case of *In Re Certain Carriers*, 229 F. Supp. 259 (D.C. 1964) it was stated:

"The Award is final and binding on both sides and must be obeyed by all parties."

The fact that no official or agency of any state government participated is now dramatically brought to focus. Excluding the decision of the lower court, there is no judicial decision known which holds that arbitration between the unions and management nullifies statutes and is binding on a state.

III

There is No Genuine Conflict Between Public Law 88-108 and State Enacted Minimum Crew Requirements. -

The majority opinion of the court below found and adjudged that Public Law 88-108, the Award and the conclusions of the special boards of adjustment so totally occupied the subject of railroad crew consists as to preempt state enactments touching this field.

As offered previously, suprenacy of federal legislation is not invoked unless there is a clear manifestation of legislative purpose to supersede state law. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). It is recognized that in the absence of such

an expressed intent, if the federal legislation is so comprehensive as to be incompatible with the local law, then necessarily all conflicting state legislation which would frustrate the purpose is superseded by the presence of the federal statutes. *Local 20 v. Morton*, 377 U.S. 252 (1964). Hence, as in this case, in the absence of any expression on the part of Congress to pre-empt state minimum crew laws and faced with a legislative history replete with disavowals of purpose to supersede state laws, the lower court's decision must rest on the theory that Public Law 88-108 has completely or so substantially occupied the subject of minimum crews as to override all state statutes.

It was argued by the Railroads in the district court that there was an irreconcilable conflict between the Award and the Arkansas statutes. This conflict is urged by appellees to have created a theoretical concept of jeopardy. The majority of the district court accepted the proposition that the Railroads could not comply with the Award and still abide by the requirements of the Arkansas crew consists statutes. It is submitted that this proposition is untenable. Such a conflict is more apparent than real and more contrived than believed. It must be reiterated that the National Award provided for only minimum consists as an arbitrary change of the work rules. The spirit of the arbitration does not prohibit the employment of additional trainmen that might be required by state statutes or the desire of railroad management. In fact, it is incomprehensible to believe that this interpretation would possibly violate the Award.

The lack of depth to the theory of incompatibility is revealed by the two-year termination period provided by Public Law 88-108 (Sections 4 and 8; R.77, 78). The

district court held that the expiration of the Award would not revive the state statutes or provide the states with renewed authority to enact minimum crew statutes. It is understood that at the conclusion of the compulsory arbitration period, the unions and the carriers will be free to negotiate further. There is no assurance, however, of what standards will be used. Furthermore, the Award itself and the entire legislative arbitration complex, can be altered or terminated any time by the agreement of the parties. Hence, even if it may be presumed that the Board, as originally constituted, was concerned with at least the fundamental aspects of railroad safety, which was undoubtedly directed more to the benefit of employees than the general public, this concern, after the expiration of the Award, is to be substituted by purely economic factors, self-help, and collective bargaining. Under these circumstances, it is obvious that the safety and welfare of the national public, if important at all initially, will be relegated to a merely ancillary position in connection with the negotiation and settlement of labor contracts.

CONCLUSION

This litigation has been revealed to be extremely important to each of the states irrespective of current full crew statutes or regulations, for if the decision of the lower court is affirmed, each state will be deprived of its traditional and established authority to enact reasonable safety regulations applicable to the railroad industry. This police power is a precious requisite to enable each state to discharge its obligations for the health, safety and welfare of its citizens. What is even more discouraging, the affirmation of the decision of the district court will set a dangerous precedent threatening virtually every aspect of state governmental authority which touches, though even incidentally, with a concurrent right of the Federal Government.

It is urged that for the several reasons expressed in this amici curiae brief the decision of the court below be reversed so that the delicate balance of State and Federal Government may remain undisturbed each complementing while respecting the other.

November 1, 1965

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 69 and 71

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF
RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND
BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA,

Appellants,

—v.—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE
KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI
PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, and THE TEXAS AND PACIFIC RAILWAY COM-
PANY,

Appellees.

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh
Judicial Circuit of Arkansas, and JOHN W. GOODSON,
Prosecuting Attorney for the Eighth Judicial Circuit of
Arkansas,

Appellants,

—v.—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE
KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI
PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, and THE TEXAS AND PACIFIC RAILWAY COM-
PANY,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR APPELLEES

OPINIONS BELOW

The majority and dissenting opinions of the District Court for the Western District of Arkansas are reported at 239 F. Supp. 1 and appear at R. 227-83.

The national arbitration Award made pursuant to the provisions of Public Law 88-108, sometimes referred to as the Award of National Arbitration Board No. 282, and the opinions rendered in connection with the Award, are reported at 41 Lab. Arb. 673 (1963) and appear at R. 80-174.

Examples of Awards of the local Arbitration Boards relevant to Arkansas (with respect to freight and switch train manning-level questions, other than the fireman question) which were provided for by the national arbitration Award, are set forth at R. 176-185; R. 186-193; and R. 194-202. These Awards were submitted as typical of those relating to the various interstate carriers operating in Arkansas. (R. 174-75) One of these Awards—the one with respect to Missouri Pacific Railroad Company (R. 176)—is reported at 42 Lab. Arb. 917 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Public Law 88-108, 77 Stat. 132, 45 U.S.C following § 157; Arkansas Act 116 of 1907 (Ark. Stat. Ann. §§ 73-720 through 722 (1957)); and Arkansas Act 67 of 1913 (Ark. Stat. Ann. §§ 73-726 through 729 (1957)), are set forth in the Brief for Appellants in No. 69, pp. 43-49, and appear at R. 76-78, R. 22-23, and R. 23-24, respectively.

In addition, there are also involved the Commerce Clause of the United States Constitution, which is set forth in

Appendix I hereto (p. 1a); the National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1, which is set forth in Appendix II hereto (p. 1a); and the Railway Labor Act, 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151 *et seq.*, particularly § 2 and §§ 5 through 10 thereof, which sections are set forth in Appendix III hereto. (p. 2a)

QUESTIONS PRESENTED

1. Does Congress' scheme for compulsory and binding arbitration of the dispute as to the appropriate manning level on freight train and switching crews, set forth in Public Law 88-108, and the national Award and the local Awards relating to Arkansas rendered under that arbitration—which provide for manning levels lower than those provided by the Arkansas laws prescribing minimum railroad crew manning levels—preclude the operation of those Arkansas laws?

2. Does the Congressional scheme of railway labor relations regulation, looking toward "the complete independence of carriers and of employees" and toward "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," embodied in the Railway Labor Act, taken with the Congressional policy for the regulation of interstate transportation expressed in the National Transportation Policy, preclude the operation of the Arkansas laws prescribing minimum railroad crew manning levels?

3. Do the Arkansas laws in question amount to legislation discriminatory against interstate commerce, in violation of the Commerce Clause?

STATEMENT

This is a direct appeal from a final judgment entered on March 8, 1965, by a district court of three judges convened pursuant to 28 U.S.C. §§ 2281 and 2284, which declared two Arkansas railroad "crew consist" laws to be in substantial conflict with Public Law 88-108 and therefore unenforceable against appellees, and which granted an injunction against the enforcement of the Arkansas laws. (R. 284-85)

1. *The background of Public Law 88-108.*¹—In 1959 and 1960 virtually all of the nation's railroads on the one hand, and the five national operating brotherhoods on the other, served notices pursuant to Section 6 of the Railway Labor Act as to the subject of the "consist"² of engine and train crews. (R. 43) The railroads proposed to eliminate requirements for the use of firemen on diesel engines and requirements of stipulated numbers of other crew members in freight and yard service, and to restore these matters to management discretion. The brotherhoods' proposals were to establish new national rules fixing the minimum crew consist in all classes of train service as an engineer, a fireman, and a conductor and two trainmen. (R. 61, 66, 72)

When negotiations between the parties failed to produce agreement, a Presidential Railroad Commission was established in 1960 to investigate the facts and make recommendations for the resolution of the dispute arising out of

¹ The circumstances giving rise to the enactment of Public Law 88-108 are thoroughly reviewed in the opinion of the district court. R. 239-43; 239 F. Supp., at 9-11.

² Used as a noun in this area.

the notices. The Commission engaged in an intensive thirteen month study of the issue, which included hearings, independent studies, and field trips to examine actual railroad operations.³ In 1962 the Commission issued a report which was supported by detailed findings on all aspects of the dispute, with special emphasis on safety.⁴ The report recommended the elimination of firemen on diesels in freight service, as well as the adoption of procedures whereby the number of brakemen and switchmen would be reduced. The Commission also proposed liberal allowances for persons thus separated from service.⁵ These recom-

³In describing its work, the Commission stated: "Never in American history have railroad labor relations been more thoroughly examined or more fully ventilated than during this past year." Report of the Presidential Railroad Commission (1962), p. 10. (Henceforth, Pres. Comm'n Rep.)

⁴See Pres. Comm'n Rep., pp. 9, 11, 35-50, 53-64. See also the extensive discussion of the safety factors in the dissents, as well. *Id.*, at 189-226, 237-46, 266-67.

⁵The Commission's Report recognized that a nationwide solution of the problem was urgently called for—not one impeded by a multiplicity of varying state laws. The Report also recognized that the solution which it recommended—the elimination of firemen in freight service and a reduction in force of brakemen and switchmen, in each case attended by liberal compensation provisions for persons displaced—was a solution which required nationwide application. But because the Commission was an advisory body, its actions could neither bind the parties nor supersede the inconsistent state laws:

"[M]ost of the legislation of this kind was enacted prior to 1920. The laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that there will be difficulty in applying the rule recommended by us in States where 'full crew' laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge." Pres. Comm'n Rep., p. 64.

As developed below, pp. 14-15, *infra*, the Arkansas laws in question were enacted in 1907 and 1913.

mendations of the Presidential Railroad Commission were accepted by the railroads but rejected by the brotherhoods. (R. 240-41; 239 F. Supp., at 9-10)

An effort at mediation through the National Mediation Board was then attempted. When the Board made a proffer of arbitration pursuant to Section 5 of the Railway Labor Act, the railroads agreed, but the brotherhoods rejected the proffer. The National Mediation Board was consequently forced to terminate its services. R. 241-42; 239 F. Supp., at 10. See *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963) (holding that the parties were left to self-help at that point unless the President established an Emergency Board).

Under Section 10 of the Railway Labor Act, the President then created an Emergency Board to investigate and make recommendations respecting the dispute. After careful study, the Emergency Board made proposals aimed at eliminating unnecessary positions, and, at the same time, assuring safety on the railroads.* Although its recommendations were in many respects more favorable to the brotherhoods than those of the Presidential Railroad Com-

*The Board recommended that the carriers be given the right to eliminate firemen's jobs, subject to challenge by the brotherhoods on the ground that "discontinuance of the job . . . would unduly endanger safety or unduly burden other employees." The Board suggested that the remaining crew positions be reduced only by natural attrition, and that any manning-level issues in this regard be resolved by local negotiations pursuant to national guidelines "based on considerations of safety and efficiency." Where the parties could not reach agreement, a special referee system was proposed to resolve all disputes.

The Emergency Board also recommended generous severance allowances for firemen whose positions were thus eliminated. See Report to the President by Emergency Board No. 154, incorporated in Hearings before the House Committee on Interstate and Foreign Commerce on H. J. Res. 565, 88th Cong., 1st Sess. (1963), pp. 45-47 (hereinafter referred to as "House Hearings").

mission; the Emergency Board's recommendations, submitted on May 13, 1963, were agreed to by the railroads but turned down by the brotherhoods. (R. 242; 239 F. Supp., at 10)

In the face of a clear threat of a nationwide rail strike, President Kennedy on July 22, 1963 requested passage of legislation to deal with the train-manning controversy. President Kennedy's request was for legislation empowering the Interstate Commerce Commission to approve, disapprove or modify work rules changes submitted to it on which the parties could not come into agreement. (R. 52-54) Rules so put into effect would have simply the status of "interim rules" and be operative for a two-year period. (§ 4, R. 53) The President's message stressed that, in his view, this method had certain advantages over a scheme of compulsory arbitration. (R. 49)

Congress' response to this request was in somewhat different terms from that requested by the President. Congress proceeded on August 28, 1963 to enact Public Law 88-108, which, despite the President's recommendation to the contrary, imposed a compulsory arbitration solution on the parties. The Act established a seven-man arbitration board, which was directed to determine the issues raised by the parties in their notices with respect to the manning-level question. In this regard, Section 3 empowered the Board to "resolve the matters on which the parties were not in agreement" and to make a binding award which "shall constitute a complete and final disposition of the ... issues."

The Arbitration Board was not left at large as to the standards by which it should be guided in making its award. Section 7(a) of the Act provided express guidelines.

The standards laid down by Section 7(a) were:

- (1) "The effect of the proposed award upon adequate and safe transportation service";
- (2) "The effect of the proposed award upon . . . the interests of the carrier and employees affected"; and
- (3) "Due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

The Act—unlike the President's proposal—integrated its compulsory arbitration provisions into the existing scheme of labor-management relations provided for by the Railway Labor Act, by providing that the arbitration should be conducted, where applicable, pursuant to Sections 7 and 8 of that Act, and that the award should be filed in the manner provided for by the Act. (§ 4, R. 77)

2. *The Award.*—(a) *As to Firemen.*—The Arbitration Board concluded that, in general, the use of firemen in diesel freight service and in yard service was unnecessary. Its Award accordingly provided for the elimination of 90% of the firemen's jobs in each local seniority district. (R. 83; 41 Lab. Arb., at 675) The local brotherhood chairman in each case was given the right to designate which positions would comprise the 10% retained. Exceptions were provided, however, for yard locomotives which were not equipped with "a dead-man control in good operating condition," as to which locomotives a fireman was unconditionally required;⁷ and for enough jobs to provide employment for firemen who were being retained in service

⁷ For the background of this requirement, see note 10, p. 11, *infra*.

pursuant to the employment protective provisions of the Award.³

It was through the last-mentioned provisions that the Award accorded generous employment protection to the firemen. Thus, in general, the Award provided that any fireman with at least ten years' seniority had to be retained in engine service, that is, as a fireman or an engineer. (Award, para. II C(7), R. 87; 41 Lab. Arb., at 677) As noted above, sufficient extra jobs were required to be provided to accommodate these firemen. Furthermore, any fireman with between two and ten years' seniority, the Award provided, had either to be retained in engine service, or offered a comparable position. If he accepted the comparable position offered, he had to be paid a relocation allowance, and be guaranteed annual earnings, for a five-year period, equal to his last year's earnings prior to the transfer. Even if the fireman refused to accept the proffered position, he was to receive a very substantial severance allowance. (Award, para. II C(6), R. 86-87; 41 Lab. Arb., at 676-77) While the Award provided that the employment of firemen with under two years' seniority might be terminated, that

³ The core of the Award, as far as it effects a reduction in jobs for firemen, is paragraph II B(5):

"After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a dead-man control in good operating condition." (R. 84; 41 Lab. Arb., at 675)

termination could only be accomplished, the Award provided, upon the payment of substantial severance allowances. (Award, para. II C(2), R. 85; 41 Lab. Arb., at 676)

(b) *As to Brakemen and Switchmen.*—The basic approach of the Award for resolution of the other issues relating to manning levels was to direct that these questions be resolved by binding arbitration by subordinate, local arbitration boards. The Award, accordingly, made provision for a binding local arbitration procedure whereby the number of crew members—apart from firemen—to be used in road freight and yard crews was to be fixed on a local basis by Special Boards of Adjustment. (Award, para. III B(1), R. 91; 41 Lab. Arb., at 678)

However, while the local Special Boards of Adjustment were to have power to determine questions of manning level, and thereby to reduce the requirements for the number of jobs on each train, the National Board itself imposed an overall requirement, cutting across the actions to be taken by the local boards. This was the employment protection condition which it imposed to guarantee that there would be no discharges of personnel as a result of the reduction in jobs on each train.

This protective provision was contained in paragraph III D of the Award. In general, it provided that all train service employees on the effective date of the Award were entitled to continue to work in train service until their employment was terminated by natural attrition, such as by death, disability, retirement, or discharge for cause. (R. 94; 41 Lab. Arb., at 679-80)

(c) *Safety Considerations.*—In determining that the carriers should be free to abolish 90% of the firemen's positions, and in assessing the remaining crew consist issues,

the Board conducted extensive proceedings,⁹ which focused principally upon the question of safe operations of the trains. The Award itself specifically mentions that consideration was given to the safety issue, and directs the parties to base the procedure for determination of the 10% of firemen's positions to be retained "upon consideration of safety, undue work burden, and adequate and safe transportation service to the public." (R. 83; 41 Lab. Arb., at 675) It also requires that firemen be used on all yard locomotives not equipped with an efficiently operating dead-man control.¹⁰ (R. 84; 41 Lab. Arb., at 675)

The thoroughness with which the Board studied the safety issue is typified by the opinion of its neutral members:

"Of these three considerations [safety, burden on other crew members, and adequacy of service], that of safety of railroad employees and equipment seems to us, in the context of this case, to require the most careful attention.

⁹The opinion of the neutral members states:

"The Board has today completed the task which Congress set it. After holding twenty-nine days of hearings, receiving the testimony of more than forty witnesses recorded in almost 5,000 pages of transcript, examining more than 200 documentary exhibits, together with a number of motion pictures, photographs, and charts, making inspection trips to four railroad yards in the Chicago area and discussing the issues at length in executive session, the Board has executed and filed its award on the fireman and crew consist issues." R. 108; 41 Lab. Arb., at 685.

¹⁰This provision was in similar terms to one of the recommendations of the Report of the Presidential Railroad Commission. See Pres. Comm'n Rep., pp. 43-44. This was the only specific circumstance identified by the Presidential Commission as one in which the demands of safety required that there be a fireman.

"This last observation merits a brief additional comment and explanation. It may be fairly stated that concern with safety has pervaded this entire proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel . . . " (R. 116; 41 Lab. Arb., at 688)

The opinion accordingly analyzed each of the reasons offered for retaining firemen on freight trains in terms of any possible impact that the elimination of firemen could have on safety. (R. 112-16; 41 Lab. Arb., at 687-88)

This preoccupation with safety considerations not only permeates the Board's opinion as to the fireman question, but is manifest in the standards laid down by the National Board for application by the local Special Boards of Adjustment. The guidelines imposed on the local boards by the National Board relate almost exclusively to safety factors.¹¹

¹¹ The Arbitration Board instructed the Special Boards of Adjustment to use the following guidelines in reaching their decisions:

"C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

"C(2). General Considerations.

- (a) Assurance of adequate safety.
- (b) Avoidance of unreasonable burden or workload on members of the crew.
- (c) Changes in operating conditions, including density of traffic.
- (d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
- (e) Special conditions which exist on any particular assignment.

(footnote continued on next page)

(d) *The Local Awards as to Arkansas.*—The Local Special Boards of Adjustment have made local Awards with respect to the operations of each of the appellees in Arkansas. The Awards so made regarding the Missouri Pacific Railroad Company and the Texas and Pacific Railway Company were submitted as typical. (R. 174-75)

These local Awards, which are substantially the same as to each carrier, in essence provide that there will be two brakemen on main line local freight trains; one brakeman on branch line operations; and one helper on yard engine service, except that no helper will be required in certain yards, including the Paragould yard in Arkansas. (R. 185; 42 Lab. Arb., at 921)

In these Awards, once again, the most liberal employee protection provisions were provided, because of Paragraph III D of the national Award which provided in essence that although jobs might be eliminated through these Awards, employment could be reduced only by natural attrition. See p. 10, *supra*; R. 183-84; 42 Lab. Arb., at 920.

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- (f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
 - (g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
 - (h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
 - (i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
 - (j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train-to-way-side radio, and walkie-talkies).
 - (k) The presence or absence of a fireman in the engine service crew." (R. 92-93; 41 Lab. Arb., at 679)

Like the National Award, the local Awards bespeak a concern with, and a full consideration of, the safety factors involved, (R. 179, 182-183; 42 Lab. Arb., at 918, 919-20) and recognize that "basically" all the relevant guidelines under which the Awards were made "relate to safety of operation or workload." (R. 178; 42 Lab. Arb., at 918)

3. *The Arkansas Laws.*—(a) *Manning-Level Requirements.*—The two Arkansas laws in question were enacted in 1907 and 1913. The 1907 legislation¹² relates to freight trains and provides, with certain exceptions which will be discussed below, that no freight train may have a crew "consisting of less than an engineer, a fireman, a conductor, and three (3) brakemen, regardless of any modern equipment . . ."

The 1913 legislation¹³ relates to switch crews operating in cities of the first and second class where switchings are being made "across public crossings within the city limits." This Act provides, with certain exceptions which will be related below, that each such crew must consist of "one (1) engineer, a fireman, a foreman, and three (3) helpers." Both Acts have been applied to diesels though their use was unknown in 1907 and 1913. (R. 29)

Thus, while the national arbitration Award, in effect, permits the abolition of 90% of the firemen's positions on diesels in each locality, the Arkansas Act of 1907 requires a fireman on each train. Again, the relevant local Awards as to freight operations provide for two brakemen on main line operations and one brakeman on branch line opera-

¹² Act No. 116 of 1907, Ark. Stat. Ann. §§73-720 through 722. (R. 22-23)

¹³ Act No. 67 of 1913, Ark. Stat. Ann. §§73-726 through 729. (R. 23-24)

tions, while the 1907 legislation provides for three brakemen in each case. In switching operations the relevant local awards provide for one helper except in certain situations—such as the Paragould, Arkansas, yard—where only a foreman is required; the Arkansas Act of 1913 provides that in each case there shall be three helpers besides the foreman.

While there is legislation similar to that of the Arkansas legislation in seven states,¹⁴ no state legislation provides for higher manning levels than the Arkansas legislation and generally the statutes provide for lower levels.¹⁵ The annual cost of the appellees' compliance with the Arkansas laws exceeds \$6,000,000.¹⁶ (R. 238; 239 F. Supp., at 8)

(b) *The Exceptions.*—The Arkansas 1907 legislation, relating to manning levels on freight trains, provides exceptions for railroad companies whose lines are less than fifty miles in length, and for trains of less than twenty-five cars. Ark. Stat. Ann. § 73-721. (§ 2, R. 22) The 1913 legislation, regulating the manning levels on switch operations, provides an exception for companies "operating railroads less than one hundred (100) miles in length." Ark. Stat. Ann. § 73-728. (§ 3, R. 23)

¹⁴ For an analysis of the rapidly dwindling number of states that have such legislation, see note 36, p. 57, *infra*, and note 7, p. 73, *infra*.

¹⁵ Only Indiana, Nebraska, New York, and Washington impose the same manning requirement on freight trains as does Arkansas—a six-man crew consisting of an engineer, a fireman, a conductor, and three brakemen (or, in some cases, two brakemen and one flagman). While New York, Ohio, and Indiana specify that five men be used in switching operations, no state other than Arkansas requires six-man crews for these operations. (For a complete list of citations to relevant state laws, see note 7, p. 73, *infra*.)

¹⁶ Computed by comparing costs under the Awards with those under the Arkansas laws.

All the seventeen intrastate railroads operating in Arkansas have less than fifty miles of track (R. 203-04, 208-11)¹⁷ and accordingly are exempt from both Acts. Ten of the eleven interstate railroads operating in Arkansas have over fifty miles of track and accordingly must comply with the 1907 legislation relating to manning levels on freight trains. Eight of the eleven interstate carriers have over 100 miles of track and accordingly are subject to the 1913 switching crew minimum manning-level legislation. (R. 203-04)

4. *The Present Action.*—This action was commenced on April 10, 1964, by the present appellees, six interstate railroads operating in Arkansas, against certain state prosecuting attorneys (appellants in No. 71), seeking an injunction against their continued enforcement of the Arkansas "crew consist" laws. (R. 1-22) The railroad brotherhoods, appellants in No. 69, intervened. (R. 24-27)

The contention of appellees was that the Arkansas laws had been superseded by Public Law 88-108 and the Awards rendered under it; that, in any event, they had been super-

¹⁷ The records of the Arkansas Commerce Commission placed in evidence in the district court show that each of the intrastate railroads has less than one hundred miles of line and is consequently exempted from the switch crew law. (R. 203-04) Although the Commission records indicate that two of the intrastate carriers have over fifty miles of trackage, additional affidavits made by officials of the carriers demonstrate that both companies have less than that amount and are therefore exempt from the Arkansas freight crew law. Thus, one of these carriers has less than twenty miles of line. (R. 210-11) Similarly, the other such carrier reported its total trackage to the Commission on the basis of a tabulation which erroneously included certain portions of switching track so that in actuality that company also has less than fifty miles of line and therefore does not comply with the 1907 freight crew law. (R. 208-09) The affidavits make clear that neither carrier observes either the 1907 or 1913 laws, each using a five-man crew for all operations. (R. 209, 211)

seded by the Railway Labor Act and the National Transportation Policy; that the laws amounted to an unconstitutional discrimination against interstate commerce; that the laws constituted an unconstitutional burden on interstate commerce; and that the laws violated the Equal Protection and Due Process Clauses.

The contentions as to the effect of the Federal legislation, and the Equal Protection and unconstitutional discrimination contentions, were brought on by appellees through a Motion for Summary Judgment. (R. 40-41) The district court granted the Motion for Summary Judgment on the ground that the Arkansas laws were "in substantial conflict with Public Law 88-108," concluding:

"The attacked statutes constitute an obstacle to the accomplishment of the federal aims and purposes and frustrate the national scheme of regulation, and must be deemed superseded by the federal legislation." R. 275; 239 F. Supp., at 27-28.¹⁸

The prosecutors and the Brotherhoods appealed to this Court, and probable jurisdiction has been noted.¹⁹ (R. 296)

¹⁸ Largely because of the holding of this Court in *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249 (1931), that these state laws were not preempted by the Railway Labor Act and the Interstate Commerce Act, as those federal statutes then stood, the dissenting judge deferred to this Court with respect to an application of the preemption doctrine based on the federal statutes as they now exist. However, on the merits of the preemption question he did observe: "I recognize that a strong case can be made for preemption in the situation here presented." (R. 282; 239 F. Supp., at 32)

¹⁹ On March 27, 1965, after the district court had unanimously declined to stay its injunction (R. 286-87), Mr. Justice White granted a stay of that injunction. (R. 294)

SUMMARY OF ARGUMENT

I.A. 1. The Arkansas manning-level laws conflict with Congress' compulsory arbitration solution to the railroad manning-level controversy, Public Law 88-108, and with the Arbitration Awards rendered under it, and accordingly cannot be enforced. The decisions of this Court teach that even a collective bargaining contract entered into pursuant to the National Labor Relations Act or the Railway Labor Act supersedes the terms of inconsistent state legislation touching on labor-management relations. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *California v. Taylor*, 353 U.S. 553 (1957). And the Awards rendered under the compulsory arbitration law are more than simply collective bargaining agreements. They are the binding directives of public agencies exercising the delegated powers of Congress and considering and resolving the public interest factors specified by Congress. Accordingly, it follows *a fortiori* that the Awards supersede the inconsistent Arkansas statutes.

2. (a) There can be no question that the Awards and the Arkansas statutes are inconsistent. The National Award says that in general firemen need not be used on freight trains while the Arkansas statute says they must. Likewise, the Awards provide for a lower level of crew manning than the six men prescribed by the Arkansas statute. (b) It ignores the background of the Awards to say that there is no conflict because the carriers could comply with the Arkansas statutes without affirmatively violating the Awards. The question at issue in the dispute, and resolved by Public Law 88-108 and the Awards was, at what level were the railroads to be permitted to man

the trains? The intent of the legislation and of the Awards was not simply to establish minimum crew levels but to permit management to operate at that specified manning level.

B. The Arkansas laws may not be sustained as "local health or safety regulations" which might stand alongside the federal provisions. 1. Whatever may be the effect of the Arkansas manning level statutes on safety, they have a direct impact on what has been the central labor-management problem of the railroads for over a decade—the number of jobs to be provided on each train. These statutes are quite different from the usual state safety laws as to safety appliances, purity of water supply, sanitary facilities and the like. They are directed at the economic core of labor-management problems in the railroad industry.

2. Moreover, the federal Boards which produced the Awards were expressly and primarily directed by Congress to take into account, in making their Awards, the safety implications of the question of manning levels. It is plain that the Boards carefully and painstakingly did so. Thus, Congress here took in hand the entire problem of manning levels on the nation's railroads—the safety aspects as well as the predominant economic aspects of the problem. It authorized and directed the Boards to make an Award dispositive of the whole matter, and the Boards have done so. Since Congress has taken in hand the entire subject, including whatever safety implications it has, the state statutes cannot be sustained on any basis.

C. The legislative history of Public Law 88-108 is consistent with supersession of the state manning level laws.

1. The classic tests of legislative history and purpose that

have been followed by this Court in labor preemption cases all lead to the conclusion that the state laws have been superseded here. The problem with which Congress was faced was a nationwide problem. Congress' intention to take the entire subject in hand and provide a national solution for it was manifest. Its solution was inconsistent with the survival of the state laws. 2. The random contrary expressions in the legislative history are primarily directed at rejected forms of the legislation, or are simply predictions of what the courts would hold. Indeed, even on this level, the central fact is that after repeated recognition before Congress of the possibly preemptive effect of the legislation it was about to pass, and despite the fact that the legislation was subject to repeated amendment, no saving clause for the state manning-level laws was included.

D. The effect of Public Law 88-108 is permanently to supersede the Arkansas laws. To be sure, Section 4 of the legislation—following the language of Section 8(j) of the Railway Labor Act as to the duration of an arbitration Award—provides that the Award “shall continue in force” for two years; but it does not follow that state laws revive upon the expiration of that period. 1. Congress adopted the general structure of the Railway Labor Act in dealing with this dispute, and incorporated the compulsory arbitration Award into its framework. The Railway Labor Act contemplates a continuity of relationship between the parties of a much greater degree than is contemplated by the National Labor Relations Act. Under the Railway Labor Act, the terms of employment fixed by agreement or by arbitration award remain in effect until changed in the manner provided in that Act. Accordingly, while during the two-year period the Award, like any Award under the Railway Labor Act, is not subject to change under the

Act's provisions, thereafter, the terms and conditions of employment it fixed, like those fixed by any other award, remain in effect indefinitely unless changed pursuant to the Act. Thus, as the Award rendered under Public Law 88-108 created a continuing status between the parties, it also created a continuing supersession of the Arkansas laws.

2. Moreover, the terms of the Award—which terms were, on the basis of the prior recommendations of various public bodies, in their general outlines quite clearly contemplated by Congress—negate any possibility of a revival of the state laws after the two-year period. For the Award contemplated generous separation allowances for the displaced employees. These provisions were totally inconsistent with any notion that the state laws would revive after the two years and require the railroads, after paying millions of dollars in severance pay, to rehire the separated employees or to hire others in the jobs declared by the Awards to be superfluous. When Congress enacted Public Law 88-108 and sanctioned a solution of the dispute inconsistent with the state laws, the status quo was completely altered. It would disrupt peaceful labor relations and the fabric of the Railway Labor Act to hold that after the Award expires the framework established by the Railway Labor Act for the revision of the terms of the Awards could be totally disregarded and the state laws could come back into effect.

II. Even if the terms of the Awards had been reached through the collective bargaining process, those terms would have superseded the Arkansas laws by reason of the Railway Labor Act and the National Transportation Policy.

1. The Railway Labor Act provides a comprehensive scheme for the resolution of disputes between carriers and employee associations through bargaining, mediation and arbitration. Basic labor-management problems in the railroad industry are generally nationwide, as was the dispute in question here. Under this Court's decisions interpreting the effect of collective bargaining agreements under the National Labor Relations Act and the Railway Labor Act, a collective bargaining contract containing the terms in question would supersede the terms of an inconsistent state law. *California v. Taylor, supra; Teamsters Union v. Oliver, supra.*

2. If there is to be any limit in the name of safety put on the solutions that the parties could reach as to manning levels, it is clear that that limit should come from a federal statute. Any other source of limitation, in view of the national interests in the whole subject matter—including the safety aspects—indicated by the Railway Labor Act and the National Transportation Policy, would lead to chaotic divergences and would frustrate the Congressional purpose inherent in the Railway Labor Act.

III. The Arkansas laws amount to an unconstitutional discrimination against interstate commerce. Their exceptions, though phrased in general terms, as a practical matter exempt all the intrastate railroads while including virtually all the interstate railroad mileage. Discrimination of this nature against interstate commerce, this Court's decisions indicate, is forbidden by the Constitution. It does not matter whether the discrimination against interstate commerce lies on the face of the statute or whether it is simply inherent in its practical operation.

The Arkansas statutes may not be sustained on the supposition that there is any rational basis—apart from discrimination—for the pattern of coverage which they impose. The fact of the matter is that there is no such basis. The 1913 switch crew legislation bases its coverage on the overall length of lines operated by a carrier. But plainly there is no relationship whatsoever between the overall length of a carrier's line and whether its local switching operations require a six-man crew. Similarly, the 1907 freight train legislation, which likewise makes its coverage depend simply on the basis of overall length of the carrier's line, has no rational nondiscriminatory basis for its inclusions and exclusions. Since there is no basis, apart from a discrimination against interstate carriers, which may be presented on behalf of the pattern of coverage of the Arkansas statutes, they clearly constitute an impermissible discrimination against interstate commerce.

I. THE ARKANSAS FULL CREW LAWS ARE IN CONFLICT WITH PUBLIC LAW 88-108 AND THE AWARDS UNDER IT, AND ARE THEREFORE UNENFORCEABLE UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. An Arbitration Award Rendered Pursuant to an Act of Congress Regulating Labor-Management Relationships in Interstate Commerce Supersedes Inconsistent State Laws Regulating That Relationship.

1. The decisions of this Court in the past twenty years leave no room for doubt as to the superseding effect of federal labor legislation, passed pursuant to Congress' paramount powers to regulate interstate commerce, on inconsistent state legislation regulating the labor-management relationship, or on state legislation touching that re-

relationship which poses a possibility of interference with the federal scheme. *Hill v. Florida*, 325 U.S. 538 (1945); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 771-72, 775-76 (1947); *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18, 24-27 (1949); *United Automobile Workers v. O'Brien*, 339 U.S. 454, 456-59 (1950); *Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 389-90 (1951); *Garner v. Teamsters Union*, 346 U.S. 485, 488-91, 500-01 (1953); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 231-32 (1956); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957); *California v. Taylor*, 353 U.S. 553, 559-61 (1957); *Teamsters Union v. Oliver*, 358 U.S. 283, 295-97 (1959); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963); *Teamsters Union v. Morton*, 377 U.S. 252, 258-61 (1964).

Central to the federal scheme of labor-management regulation, both in industry generally under the National Labor Relations Act and specifically in the railroad industry under the Railway Labor Act, is the collective bargaining contract. Formation of these contracts by the parties, and self-regulation of their relationship through them, is a basic goal of federal policy. And in one of the leading cases, this Court has held that a state statute must give way to the terms of a collective bargaining agreement negotiated pursuant to the provisions of the National Labor Relations Act: "The paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress." *Teamsters Union v. Oliver*, 358 U. S. 283, 296-97 (1959). See also

General Drivers Union v. American Tobacco Co., 348 U. S. 978 (1955).¹

Similar results have been held to follow under the Railway Labor Act, which, like the National Labor Relations Act, establishes a national policy of uniform application.²

¹ In the *General Drivers* case, this Court reviewed a state court decision compelling employees of a common carrier to cross certain picket lines, even though their collective bargaining agreement negotiated pursuant to the National Labor Relations Act permitted the employees to refuse to take such action. The decision of the state court was based on a Kentucky statute requiring common carriers to handle the merchandise of all shippers without discrimination. 264 S.W.2d 250, 254-55 (Ky. 1953). This Court considered the Kentucky decision to be so clearly at odds with its previous rulings in the preemption area that it unanimously reversed in a *per curiam* opinion.

² In the *Oliver* case, the Court declared that the state law was superseded by the parties' agreement because: "The application [of state law] would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . ; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." 358 U.S., at 296.

For each of the factors recited by the Court in its opinion in the *Oliver* case which expounds why a collective bargaining contract under the National Labor Relations Act supersedes inconsistent state law, there is a complete correspondence in the Railway Labor Act and the decisions interpreting it. Thus, the Railway Labor Act imposes upon the parties a duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." §2 First. Federal law is applicable to the agreement the parties make in response to that duty. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). Federal law sets outside limits to what the agreement may

Thus, this Court has held state legislation inconsistent with railroad collective bargaining contracts to have been superseded by the Railway Labor Act. In *California v. Taylor*, 353 U.S. 553, 561 (1957), the Court said:

"Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally-protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws."³

Accordingly, even if the Awards made pursuant to Public Law 88-108 were regarded simply as collective-bargaining agreements made under the authority of an Act of Congress, their terms would supersede conflicting state laws. But the Awards are something more than simply collective bargaining agreements. They are binding directives, made by arbitration boards exercising the delegated powers of the Congress, and considering and resolving the public interest factors as specified by Congress. Congress lawfully delegated to the National and local boards its unquestionable authority to fix minimum train crew employment levels on the nation's railroads.⁴

provide, in terms of such legislation as the antitrust laws, the various federal Acts relevant to railroad safety (see note 11, p. 76, *infra*), and the rules and regulations of the Interstate Commerce Commission.

³ The conflicting provisions of the collective bargaining contract in *Taylor* related to promotions, layoffs and dismissals, and to rates of pay and overtime. 353 U.S., at 555. See also *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

It is revealing that the appellants in No. 71 neither cite nor discuss either *Oliver* or *Taylor*—the two leading cases in this area!

⁴ In an action brought to enjoin the incitement of strikes in violation of the Award, the court stated: "The award is final and

Accordingly, it follows *a fortiori* from the fact that a private collective bargaining contract negotiated under authority of one of the two basic national statutes regulating labor relations—the National Labor Relations Act and the Railway Labor Act—would supersede inconsistent state labor-management legislation, that the acts of a public body functioning under similar authority would have this effect on inconsistent state legislation.

2. (a) Certainly there can be no question as to the inconsistency between the federal Awards and the two Arkansas statutes. The conflict between the Arkansas minimum train crew consist laws and the arbitration Awards entered under Public Law 88-108 is obvious and clear. The Act empowers and directs the Arbitration Board to resolve the question as to the necessity of freight train firemen and to fix the minimum size of train and switching crews. This was at the heart of the vexed question which the Board was directed to take in hand. The Board has done so. It has declared that in general firemen are not to be required;⁵ and, through the local Boards, that certain

binding on both sides and must be obeyed by all parties. Since the arbitration was conducted under the aegis of Congress, the award becomes part of the law of the land." *In re Certain Carriers*, 229 F. Supp. 259, 260 (D.D.C. 1964).

None of the appellants here raise any question respecting the validity of the Award of Arbitration Board No. 282. Its validity was sustained in all respects in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C. 1964), where it was held that Congress had in this instance made a lawful delegation of its legislative power to the Arbitration Board. The Court of Appeals affirmed, 331 F.2d 1020 (D.C. Cir. 1964), and this Court denied certiorari, 377 U.S. 918 (1964).

⁵ The original notice of the carriers under Section 6 of the Railway Labor Act sought the elimination of "all agreements, rules, regulations, interpretations, and practices, *however established*,

specified numbers of brakemen, switchmen and helpers may be used in various operations. The Arkansas laws, however, purport to require that a fireman shall be used in virtually all train operations by interstate carriers. They also purport to fix the size of train crews and prescribe levels which are in excess of those fixed by the local Awards provided for by the Board. The Commerce Clause and the Supremacy Clause ordain that the conflict must be resolved in favor of the Awards entered under the federal mandate.

The nature of the conflict may more clearly be imagined when it is considered that, under appellants' theory, it is not simply Arkansas and the other six states that have such laws that are to be free to apply their railway manning-level requirements, the terms of the federal Award notwithstanding.—Obviously, there is no room for any "grandfather clause" in this aspect of constitutional law. If Arkansas and six other states can apply their laws, the other forty-three states—or for that matter municipalities within those states^{*}—could enact and apply manning-level laws. (See Appts. Br. No. 71, p. 31)[†] More-

applicable to any class or grade of train, engine, or yard service employees, which require the employment or use of firemen (helpers) on other than steam power. . . ." (R. 61) (Emphasis supplied) See also the notice as to train crew manning levels. (R. 66) The notice did not make any exception for regulations established by color of state law, ordinance, or administrative rule.

^{*} See note 8, p. 74, *infra*.

[†] It is interesting to note that four of the six states submitting a joint brief as *amici curiae* in this case (Georgia, Louisiana, South Dakota, and Montana) do not presently have railroad crew consist laws. While they disavow any specific interest in the passage of such legislation, it is clear that, under the position they advocate, these four states as well as over thirty others could do precisely that. Moreover, recent state court decisions in Texas and Indiana

over, Arkansas and the other forty-nine states might not be content with requiring six men to ride every freight train, but might choose to impose a requirement that seven or eight men ride every one.

A brief reflection on this should make plain the conflict between the Award and the Congressional legislation on the one hand and the Arkansas statutes on the other. Congress passed Public Law 88-108 with the knowledge that the result would be some reduction of railroad crew manning levels in the direction of the present state of railroad technology. It knew approximately what the Arbitration Board would do, because it had before it the generally consistent findings of both the Presidential Railroad Commission and the Emergency Board. But under appellants' theory, the states are left free completely to set aside the intent of Congress and the Award, and in fact to require increases in train manning levels.

Thus the fact that these manning-level laws need not be peculiar to Arkansas and a few other states not only points up the conflict between these laws and the purposes of the Congressional Act and the Awards under it, but makes more vivid the reasons, taught by the prior decisions of this Court, why those laws must be deemed to be superseded.

(b) The District Court rightly rejected the fallacious argument that there was really no conflict between the federal and state requirements as to crew manning levels because both spoke in terms of minimums, so that the rail-

have invalidated those states' laws. See note 36, p. 57, *infra*. Thus the interest of all six states lies only in future state legislation.

roads could comply with the state statutes without affirmatively violating the Awards.⁸

This argument is as much at variance with the precedents as it is lacking in contact with the realities of the situation which required Congress to act. The whole point of the issue before Congress and the Arbitration Board was: at what level of crew manning were the railroads to be authorized to operate trains? The intent was not simply to establish a minimum but to permit management to operate, in its discretion, at that minimum. The management proposals, from the outset, were to "eliminate" "requirements" for firemen or for specific numbers of crew members. (R. 61, 66) Thus, the controversy was not about minimum manning levels in the abstract, but about the manning levels which, as a practical matter, management was to be free to adopt. It would completely frustrate the effect of the Award for the states to be permitted to declare that the railroads were not authorized to have their trains manned at the levels permitted by

⁸ Since the decision below, one state court seems to have accepted this erroneous contention in a decision on the Wisconsin full crew laws. *Chicago & N.W. R. Co. v. La Follette*, 135 N.W.2d 269, 277-78 (Wisc. 1965). (The Wisconsin case is still pending in the lower state courts on other constitutional issues.)

One other state court has also held that the full crew laws are not preempted by Public Law 88-108. *New York Central R. Co. v. Lefkowitz*, 46 Misc.2d 68, 259 N.Y.S.2d 76 (Sup. Ct. Westchester Cty. 1965). But see *Switchmen's Union v. Erie L. R. Co.*, Sup. Ct. Erie Cty., N.Y. (1965), where another lower court of the same state followed the decision reached by the three-judge district court in this case.

The Texas courts have reached a result similar to that reached by the district court in this matter. They have held the Texas manning-level legislation invalid, among other grounds, on the basis of preemption by Public Law 88-108 and the Awards thereunder. *Texas v. Southern Pac. Co.*, 392 S.W.2d 497 (Tex. Civ. App. 1965), writ of error refused "no reversible error," Texas Supreme Court.

the Board. It would take away an area of management discretion and economic freedom which the Board intended the railroads to have.

In this context, the contention that there is no conflict because the federal law does not require use of only a minimum crew is completely unrealistic and unavailing. Analogies are presented by several of the decisions of this Court. It has been held by this Court in this area that where federal law authorizes—though it does not require—a particular collective bargaining agreement, state legislation prohibiting it must give way. Thus, in *Teamsters Union v. Oliver, supra*, the mere fact that federal law authorized the parties to enter into the contract in question—although it certainly did not require them to enter into a contract containing those terms—was sufficient to prevent application of a state law which prohibited the arrangement. Likewise, in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), it was held that national banks could advertise the existence of their “savings” accounts, despite a state statute which forbade any but certain specified banks from using the word “savings” in advertising. This holding was reached simply on the basis of the authorization in the National Bank and Federal Reserve Acts to national banks to accept savings accounts—although the national banks were perfectly free, as a matter of federal law, not to advertise the availability of savings accounts or not to use the word “savings” in their advertising.*

In short, there can be no doubt that a very real conflict exists between the Awards rendered pursuant to Public

* See also *Teeval Co. v. Stern*, 301 N.Y. 346, 364-65, 93 N.E.2d 884, 892 (1950), *cert. denied*, 340 U.S. 876 (1950).

Law 88-108 and the Arkansas manning-level legislation—or that of any of the states which has enacted, or which might now enact, manning-level legislation, unless it happened entirely to parallel the Awards. Moreover, the decisions of this Court make it absolutely clear that a federal arbitration Award rendered in accordance with guidelines laid down by the Congress of the United States precludes the operation of state laws which are inconsistent with it.

B. The Arkansas Laws May Not Be Sustained Under Any "Local Health or Safety Regulation" Exception to the General Rule of Supersession by the Federally-Sanctioned Agreement or Award.

On prior occasions, the Arkansas manning-level laws have been upheld against claims of conflict with the Commerce Clause or with the Railway Labor Act, on the ground that they amounted to permissible local safety regulations. See *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249, 255-56 (1931); *St. Louis, I. M. & Sou. R. Co. v. Arkansas*, 240 U.S. 518, 521 (1916); *Chicago, R. I. & Pac. R. Co. v. Arkansas*, 219 U.S. 453 (1911). And, to be sure, in *Teamsters Union v. Oliver*, 358 U.S. 283, 297 (1959), this Court indicated that a "local health or safety regulation" might, under some circumstances, be upheld despite a conflict with a collective bargaining contract which federal law empowered labor and management to make.

1. This sort of exception from the rule that a state statute must bow to a federally-sanctioned collective bargaining agreement—or arbitration award—patently cannot be sustained in this case. We start with the fact that whatever might be thought to be the "safety" justification of the manning-level laws, they clearly are totally different

from the normal sort of industrial health or safety laws which deal with such subjects as safety equipment, provision of protective clothing, factory ventilation, washroom conditions and so forth.¹⁰ On their face, they are quite different from the legislation recited by the appellant brotherhoods requiring the sounding of bells or whistles at public crossings; requiring sanitary drinking cups and pure water in locomotives and cabooses; and providing for such matters as "candle power of headlights, construction of cabooses, lights on switches, signals at tunnels and first aid kits." (Appts. Br. No. 69, p. 8)

In striking contrast with these statutes, the unvarnished fact of the matter is that the Arkansas "crew consist" laws are laws guaranteeing a specified arbitrary number of jobs on each operating train "regardless of any modern equipment." They may be thought to have some safety aspects—though of course in modern railroading they are unrealistic in terms of safety—but predominantly they are "full employment" legislation,¹¹ directly regulating what

¹⁰ Listing the sort of permissible state health and safety laws in *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6-7 (1943), this Court specifically mentioned: "sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection."

¹¹ See Lecht, *Experience Under Railway Legislation* (1955), pp. 93-94: "Trainmen and firemen assumed the lead in pushing full-crew bills because unemployment was particularly severe among their members."

Slichter, *Union Policies and Industrial Management* (1941), p. 187:

"One of the most ambitious efforts to make work by requiring excessive crews, or the employment of unnecessary men, is being made (with great success) by the train service unions on the railroads. These unions have been spurred to require the employment of unneeded men by the great drop in the employment of train service employees. The train service unions have used three principal methods to make work: (1)

has been for many years the central labor-management problem in the railroad industry: the problem of the number of jobs to be provided on each train.¹² The laws thus seek—as did the state antitrust statute in *Oliver*—“specifically to adjust relationships in the world of commerce.” *Teamsters Union v. Oliver*, 358 U.S., at 297. As the *Oliver*

support of legislation, either requiring full crews or limiting the length of trains; (2) retaining obsolete rules which make work; and (3) enforcing the interpretations of rules so as to make work and to penalize the roads for using economical methods of operation.”

Twenty years later, at about the time the national manning-level crisis began, the same author considered the situation unchanged:

“Although there are an almost indefinite number of make-work methods, the following eleven varieties include most of the make-work practices: . . .

“*Requirement of Excessive Crews.* The railroad crafts have made a few attempts to negotiate excessive crew requirements, but they have relied chiefly on legislation. They have sought two types of laws—full-crew laws and train limit laws.”

[The authors proceed to explain that the latter laws have been declared unconstitutional, but that the manning-level legislation then remained in effect.] Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960), pp. 318, 322-23.

See also Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 Va. L. Rev. 196, 249-50 (1962).

¹² Indeed, the motion to intervene filed by the brotherhoods in the district court makes it perfectly plain that the primary interests of the brotherhoods in the Arkansas legislation lies in the economic benefits received by the brotherhoods and their membership from the existence of those laws. The first two recitals of the brotherhoods’ interest in the lawsuit are most revealing:

“The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in their capacity as agents and spokesmen for their members in that it would result in the loss of employment of large numbers of such members whose jobs are protected by the statutes being challenged.

“The relief sought by the complaint would have a substantial and permanent damaging effect on the Unions in that it would result in a large loss of organizational membership and

case and other decisions of this Court¹³ teach, it is not necessary for a state statute to be expressly labeled as part of the state's Labor-Management Code—or even to be primarily directed at the labor-management relationship—for the superseding force of the federal labor-management law to have its effect on it. Accordingly, the elaborate argument of the appellant brotherhoods, derived from the place in which the Arkansas Act is codified, and from the nature of its neighbors in the statute books, misses the point. (Appts. Br. No. 69, pp. 8-9)¹⁴

Indeed, it would be hard to find statutes more plainly directed at the core of labor-management economic problems than the Arkansas statutes. Those statutes frontally

income because of the loss of employment of large numbers of their members whose jobs are protected by the statutes being challenged." (R. 25)

¹³ See *Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951) (public utility law); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955) (antitrust law); *Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963) (public utility seizure law).

¹⁴ Indeed, the Supreme Court of Arkansas has not accepted the legislation in question as being simply a regulation of safety. In *Johnson v. Hall*, 229 Ark. 400, 316 S.W.2d 194 (1958), the railroad brotherhoods were seeking to require the Arkansas Secretary of State to accept the terms of a ballot title of a proposed constitutional amendment which would, in essence, have enshrined the Acts in question in the State Constitution. Under Arkansas law, the ballot title of a proposal for popular vote may not contain partisan coloring. The brotherhoods' proposed ballot title for the constitutional amendment was "An Amendment Prohibiting Operation of Trains With Unsafe and Inadequate Crews." Despite the fact that the standards of the constitutional amendment were the same as those already contained in the state crew-manning level laws, the Arkansas Supreme Court unanimously rejected the brotherhoods' contention that the proposed title was fair and non-partisan. The court commented, as to the question of the adequacy of crew manning levels in terms of safety: "Actually, this is a fact question, depending upon the circumstances in each case." 229 Ark., at 403, 316 S.W.2d, at 196.

attack, as far as the railroad industry is concerned, the basic nationwide labor-management relations problem: the question of how far the introduction of modern equipment and automatic devices will be allowed to have its natural effect of reducing employment in certain obsolete job categories.¹⁵ Cf. *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 335-41 (1960). Unlike matters of factory ventilation and sanitation, the safety aspects of this question are completely intertwined with

¹⁵ As the opinion of the neutral members of the Board, R. 128; 41 Lab. Arb., at 693-94, stated:

"[T]he size of road and yard crews in other than engine service has never been the subject of a national rule in the railroad industry. The consist of these crews, involving primarily helpers and road brakemen, has been determined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions. Only a relatively few carriers are unrestricted in determining the size of crews, and it is doubtful if even they have complete freedom to change crew size as they wish. It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

The approach the President took to these questions in proposing the legislation is clear:

"Yet we cannot stop progress in technology or arrest economic change in transportation or any other industry—nor would we want to. For technological change has increased man's knowledge, income, convenience, leisure, and comfort. It has reinforced this Nation's leadership in scientific, economic, educational, and military endeavors. It has saved lives as well as money, and enriched society as well as business. Our task as a nation, to use the phrase of the Commission report, is simply to make sure that this public blessing is not a private curse. We cannot pretend that these changes will not occur, that some displacement will not result or that we are incapable of adapting our legislative tools to meet this problem." (R. 51)

the basic economic questions.—Indeed, the discriminatory nature of the Arkansas laws, which we develop in Part III, strongly suggests that their safety aspects are minimal.

2. In itself, this would be an adequate reason for concluding that these laws are not within the "local health or safety regulation" exception to the rule of supersession. But there is a further answer to the claim that, as purported safety regulations, these laws can stand despite their conflict with the arbitration Award. That answer is found in Section 7 of Public Law 88-108. There, the Arbitration Board was given as its first guideline in making its Award the command to give "due consideration to the effect of the proposed award upon adequate and safe transportation service." Congress, in providing an arbitrated solution to the economic problems involved in the crew level question on the nation's railroads, ordained that any safety questions involved should be taken into account. Thus—for the first time—a federal standard for railroad crew manning levels has been established; a standard which has been provided for by Congress from the point of view of safety as well as the other relevant considerations.

The legislative history of Public Law 88-108 shows conclusively that Congress recognized from the outset that the safety aspects of the matter were of federal concern, and that Congress fully intended to require any arbitration board it created to give extensive consideration to the question of safety. The studies on which Congress relied in passing the bill had thoroughly canvassed all safety questions. After completing a comprehensive year-long study of the problem, the Presidential Railroad Commission—which recognized that its recommendations were contrary to the state laws—stated:

"The basic considerations which have governed our thinking in formulating recommendations have been that the Nation is entitled to a safe and efficient rail-transport system, . . . that employees are entitled to work . . . under conditions which promote efficiency, safety, and security. . . ." ¹⁶

Agencies subsequently created in an effort to resolve the dispute also gave painstaking treatment to the effect of proposed crew consist changes on the safety of railroad employees and the public.¹⁷

It is thus far from happenstance that the original bill proposed by President Kennedy required, in the event of arbitration, that "due consideration [be given] to the effect of the proposed rule upon adequate and safe transportation service to the public and . . . to the recommendations of the Presidential Railroad Commission and Emergency Board 154." Sections 3, 6. (R. 53-54) In his message to Congress, the President stressed that "an expert body should pass on these proposed rule changes in the light of public service and safety . . . I recommend that . . . the [Interstate Commerce] Commission judge the effect of each proposed rule on the adequacy and safety of transportation." (R. 48)¹⁸

¹⁶ Pres. Comm'n Rep., p. 9. Moreover, it seems indisputable that the Commission made good its promise: each issue presented to that body was assessed in terms of its impact on safety. See Pres. Comm'n Rep., pp. 35-50; 53-64; see also, pp. 189-226, 237-46, 266-67 (dissenting opinions).

¹⁷ See Report to the President by Emergency Board No. 154, incorporated in House Hearings, pp. 43, 45-46, 47; Report to the President by the Special Subcommittee of the President's Advisory Committee on Labor-Management Policy, in House Hearings, pp. 14-15.

¹⁸ The Administration bill and the President's accompanying message are also incorporated in Hearings before the Senate Com-

Along with its consideration of the previous reports dealing extensively with the safety issue, Congress—realizing that an arbitrated solution would clearly cause a reduction in then-existing train manning levels—also undertook an independent examination of the effect of the proposed legislation on the safety of railroad transportation. The hearings contain extensive discussions of this topic by union and management representatives, as well as by officials of the Department of Labor and members of Congress themselves.¹⁹ The House Report and the debates on the floor of Congress also include numerous indications of Congress' concern with safety.²⁰

mittee on Commerce on S.J. Res. 102, 88th Cong., 1st Sess. (1963), p. 1 (hereinafter referred to as "Senate Hearings"), and in House Hearings, pp. 1, 6.

¹⁹ See Senate Hearings, pp. 72, 85-86, 98, 99, 100, 429, 482-88, 491-98, 501, 504-05, 528, 530, 536, 630-34, 709-12; House Hearings, pp. 50, 107-08, 111, 618, 647, 706-23, 738-67, 803-04, 805, 815-16, 820, 996-99.

For example, the following question was asked Secretary of Labor Wirtz by Representative Harris, Chairman of the House Committee considering the proposed legislation:

"THE CHAIRMAN: In section 3 . . . you would provide that the [Interstate Commerce] Commission shall consider the effect of the proposed rule upon adequate and safe transportation service to the public.

"In looking over section 5(2)(c) of the Interstate Commerce Act it includes only adequate service . . . You have therefore added 'safe' . . . as another consideration?

"SECRETARY WIRTZ: That is correct."

House Hearings, p. 50.

²⁰ See H.R. Rep. No. 713, 88th Cong., 1st Sess. (1963), pp. 9, 21-22, 24-25 (hereinafter referred to as "H.R. Rep."); 109 Cong. Rec. 15903, 15962, 16127, 16128, 16141-42 (1963).

"[W]e have train crews all over the country—passenger trains, freight trains, freight yards, short lines, main lines—all of these various services which require negotiation as to what is needed insofar as adequacy of service and safety of service, the burden of work." 109 Cong. Rec. 16128 (Remarks of Congressman Harris).

The end result was Section 7(a)'s directive to the arbitration board to give full—indeed primary—consideration to the safety aspects of the controversy. The national arbitration Board faithfully carried out this mandate. The Award itself stated: "The Board has given due consideration to the effect of the Award upon adequate and safe transportation to the public . . ." (R. 82; 41 Lab. Arb., at 674)

The Board's action on the fireman question is illustrative of its consideration of the safety aspect. The Board made seven basic findings (R. 114-115; 41 Lab. Arb., at 687-88) on the fireman question. Five of these findings are directly related to safety questions. Typical of these findings are the following:

"In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members.

"A considerable portion of the mechanical duties now performed by the fireman is not absolutely essential to the safety and efficiency of road freight and yard operations. . . .

"In yard service the normal lack of a third man in the cab is offset in part by the reduced speed of the locomotive, and will be offset still further by installing a dead-man control in all yard engines, which our award requires as a condition precedent to the operation of such locomotives without a fireman . . .

"[W]e agree with the [Presidential] Commission 'that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that

there should continue to be either a national rule or local rules requiring their assignment on all such diesels.' " (R. 114-15; 41 Lab. Arb., at 687-88)

Moreover, after determining that 90 percent of the firemen's positions could be eliminated without impairing railroad safety, the Board set up a procedure for ascertaining the actual positions to be abolished, based exclusively "upon considerations of safety, undue work burden, and adequate and safe transportation service to the public." (Award, para. II B(1), (2), R. 83; 41 Lab. Arb., at 675)

This concern with safety also permeated the guidelines which the national Board imposed on the local Boards for the resolution of the remaining manning-level questions, which we have set out at pp. 12-13, *supra*. The national Board's guidelines are clear and definite; the first was "assurance of adequate safety," and virtually all of the remaining ones were obviously related to that goal. (Award, para. III C, R. 92; 41 Lab. Arb., at 679)

The opinion of the neutral members of the Board thus gives an accurate summary of the Board's approach when it points out: "It may fairly be stated that concern with safety has pervaded this entire proceeding." (R. 116; 41 Lab. Arb., at 688) This opinion proceeds to assess each of the Board's conclusions with regard to crew size in terms of its potential effects upon the safety of railroad workers and the public. See R. 112, 113-24, 128-35; 41 Lab. Arb., at 686, 687-92, 693-97.

Indeed, when called on recently to testify before the Senate Committee on Commerce concerning the Board's implementation of Public Law 83-108, the Chairman of the Arbitration Board once again stressed the careful attention

the Board had given to all aspects of the safety question. In addition to quoting extensively from the opinion of the neutral members on this topic, the Chairman stated:

"The point I want to emphasize is that we spent a great deal of effort, heard a tremendous amount of testimony and came to as honest a conclusion as we could about the safety factor as a preliminary to reaching our final Award. And in so doing, we made it explicit that the question of the ability of the carriers to pay did not affect our decision as to the need for firemen."²¹

²¹ Hearings before the Senate Committee on Commerce on the Administration of Public Law 88-108, 89th Cong., 1st Sess. (Aug. 2-Sept. 28, 1965), Tr. pp. 844-45 (hereinafter referred to as "1965 Senate Hearings") (the Hearings are not yet reported in printed form).

Additional evidence presented at the 1965 Senate Hearings shows clearly that the Board's assessment of safety issues was in fact correct. With regard to a charge by one of the brotherhoods that the elimination of firemen pursuant to the Award had resulted in a "deterioration of railroad safety," Senator Lausche placed in the record a letter from the Chairman of the Interstate Commerce Commission stating that "since implementation of Public Law 88-108 by the railroads, the Commission has investigated no accident . . . in which it was found that the absence of a fireman was a contributing or the proximate cause." 1965 Senate Hearings, Tr. pp. 4, 13. See also *id.*, Tr. p. 692 (testimony of the Chairman of the Interstate Commerce Commission to the same effect).

Still more significantly, the head of the Brotherhood of Locomotive Engineers, a union whose members would be directly affected by any purported lack of safety resulting from elimination of firemen, pointed out in a letter to the Committee:

"[Our] engineers report that the Award as applied has not adversely affected either the employees or rail service in general. The engineer's responsibilities without a fireman are just the same as they were with one. . . . In short, engineers are now efficiently and safely moving their trains over the road."

1965 Senate Hearings, Tr. pp. 14, 18.

The conclusion is inescapable that Congress here took in hand the entire problem of crew levels on the nation's railroads—the safety aspects as well as the predominant economic aspects of the question. It authorized and directed its creature, the Arbitration Board, to make an award dispositive of the whole question, and the Board has done so.²³

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Here Congress has provided, in the most explicit terms in Section 7(a) of the Act, for a public review of all the relevant safety questions. Thus, there is no gap—which a local safety regulation might conceivably fill—in the federal scheme. Accordingly, the narrow “safety” justification under which these crew consist laws have been upheld in the past can no longer stand. Once Congress has entrusted the question of safety as affected by crew levels on the trains operated by interstate carriers to the Arbitration Board, inconsistent state regulation of crew levels could no more stand as a regulation of safety than it could as a frank, undiluted economic regulation of a matter for which the parties through a collective bargaining contract, or a compulsory arbitration board, had provided a solution.

²³ It is clear that whenever Congress or one of its agencies has established rules comprehensively treating a particular safety question, any state laws purporting to regulate the same subject matter must, under the Supremacy Clause, be set aside. *E.g.*, *New York Central R. Co. v. Winfield*, 244 U.S. 147 (1917); *Southern R. Co. v. Railroad Comm'n*, 236 U.S. 439, 446-48 (1915). “[W]hen the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them.” *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919). Supersession is therefore undoubtedly called for in this case, where the challenged state legislation does not merely supplement but is in direct conflict with the Award.

C. The Legislative History of Public Law 88-108 is Consistent with Supersession of State Manning-Level Laws.

Appellants claim that the legislative history of Public Law 88-108 indicates that the Congress did not intend that state manning-level laws be superseded by the arbitration Award.—The fact of the matter is, rather, as the district court observed, that: "If any rational conclusion can be drawn from a legislative history on the question . . . it is that the Congress intentionally elected not to include a saving provision for such laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis." R. 266; 239 F. Supp., at 23.²³

The appellants primarily rely on certain statements of Secretary of Labor Wirtz during the hearings on the bill, remarks made on the floor of the House of Representatives, and a passage in the House Committee Report. All these items are conclusory statements as to legal effect. Many are in the nature of predictions as to what the courts might hold. Most relate not to the final form of Public Law 88-108, with its provisions for compulsory arbitration within the procedural framework of the Railway Labor Act—an approach which was developed in the Senate—but to the administration's proposal for ICC action.

²³ Indeed, as the district court correctly held (R. 266-67, 239 F.Supp., at 23), there is no real basis for an examination of the legislative history in this matter. Congress here plainly said that the Award was to "constitute a complete and final disposition of the . . . issues" (§3, Public Law 88-108), and nothing in the text of the Act leaves room for any exceptions on a state-by-state basis. In the light of this plain expression—and of the undisputed purpose of the Act of solving a nationwide problem—the decisions of this Court teach that there is no reason to resort to the legislative history. See *Ex parte Collett*, 337 U.S. 55, 61 (1949); *Packard Motor Co. v. NLRB*, 330 U.S. 485, 492 (1947). See also *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 160, 166 (1958).

The excerpts relied on by appellants are not controlling for two reasons:

1. The essential source of the "legislative history" of an enactment like Public Law 88-108, in terms of its effect on state laws, lies not in predictions by witnesses in Congressional hearings or by Congressmen as to what the holdings of the courts might be, or even as to their conclusions as to the legal effect of the legislation. The real source of the relevant legislative history of Public Law 88-108 lies in the nature of the problem which Congress was attempting to solve; the means by which it chose to solve it; and the interests which Congress sought to serve through the passage of the legislation. In the decisions of this Court in the complex field of the supremacy of Federal labor-management legislation, it has classically been considerations of this nature, rather than characterizations of Congressmen as to possible legal effect, which have been the dominant factors in an investigation of the legislative purpose. See, *e.g.*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239-45 (1959); *Teamsters Union v. Oliver*, 358 U.S. 283, 295-96 (1959); *California v. Taylor*, 353 U.S. 553, 565-67 (1957); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1955); *Garner v. Teamsters Union*, 346 U.S. 485, 488-91 (1953); *United Automobile Workers v. O'Brien*, 339 U.S. 454, 456-58 (1950); *Hill v. Florida*, 325 U.S. 538, 541-43 (1945).

As we have developed, the problem with which Congress was dealing was—as major labor problems in the railroad industry are apt to be—a nationwide problem. The Presidential Commission which had studied the problem and reported the preceding year indicated that a national solution was required and that some technique should be adopted to insure a national solution regardless of the

state manning-level laws.²⁴ The subsequent studies of the problem also treat it as one of national concern.²⁵

Moreover, all of the legislative history—both in terms of the antecedents of the legislation and in terms of the proceedings in Congress—bespeaks a concern with the safety aspects of the manning-level controversy. The Act as passed requires the safety aspects to be taken into account. The legislative history thus clearly indicates the purpose of Congress to deal with the very thing which is the only conceivable justification for the continued constitutionality of the statutes—the safety question.²⁶

It is apparent that Congress, in the process of enacting this emergency legislation, did not deliberate meaningfully

²⁴ The Presidential Commission clearly felt that its recommendations for the reduction of railroad manning levels "should have nationwide application," and should not be distorted by contrary state full crew laws which "apparently fail to envision modern railroad operations." It recognized, however, that it was an advisory body, and that elimination of restrictive state legislation was beyond its power. Pres. Comm'n Rep., pp. 63-64.

²⁵ In its Report to the President, Emergency Board No. 154 fully realized that the work rules controversy was a nationwide problem requiring a uniform nationwide solution. Accordingly, the Board recommended "a national rule . . . establishing a procedure for ascertaining those situations, if any, which will continue to require the presence of a fireman." See Report to the President by Emergency Board No. 154, in House Hearings, p. 45. Similarly, although the Board suggested that the other crew consist issues be settled through local negotiations, it recommended that such negotiations be conducted pursuant to nationally established guidelines. *Id.*, at 47.

In his message accompanying the proposed legislation, President Kennedy also pointed out that "this dispute over railroad work rules is part of a much broader national problem [of automation]." (R. 50; House Hearings, p. 11; Senate Hearings, p. 11)

²⁶ See *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249, 255 (1931); *Chicago, R. I. & Pac. R. Co. v. Arkansas*, 86 Ark. 412, 434-35, 111 S.W. 456, 465 (1908), *aff'd*, 219 U.S. 453 (1911); *St. Louis, I. M. & Sou. R. Co. v. Arkansas*, 114 Ark. 486, 170 S.W. 580 (1914), *aff'd*, 240 U.S. 518 (1916).

over questions of a collateral and technical nature, such as the effects of the proposed bill in the minority of states which had manning-level legislation. On the other hand, Congress could and did take into account the general interests sought to be served by the bill—the resolution of the controversy so as to avoid a debilitating national rail strike, the maintenance of safe conditions in the railroad industry, and the placing of the resolution of the controversy solidly within the general framework of the Railway Labor Act. These essential issues were considered fully and adequately—as was the policy decision to forego, in this instance, the general policy of the federal labor laws favoring a voluntary solution of labor disputes, rather than compulsory arbitration.²⁷ But, notwithstanding appellants' random quotations on preemption scattered throughout the legislative history, it is clear that the peripheral question of preemption of state law was at most afforded only a passing and inconclusive consideration.

2. Moreover, even on the level of "legislative history" on which appellants' briefs move, there is no case demon-

²⁷ Appellants make much of the references, primarily in the Senate Hearings and Senate Report, to the reluctance of Congress to pass the legislation in question, and its desire to make it "just as temporary and just as limited as possible." (Appts. Br. No. 69, pp. 29-31) See also S. Rep. No. 459, 88th Cong., 1st Sess. (1963), pp. 7, 9-10 (hereinafter referred to as "S. Rep."). But these remarks do not tell us anything about supersession of state legislation, which is what appellants suggest they are relevant to. What they were, in fact, related to was the serious question of making an exception to the established national policy of collectively bargained solutions to labor disputes, in favor of a compulsory arbitration solution. Congress wanted to make sure that this remedy was to be applied simply to the dispute before it, and that Congress' action would not serve as a precedent for the resolution of other disputes. See S. Rep., p. 7. However, the legislation makes it perfectly clear that as to the fireman and other manning-level controversies involved in the dispute, the Award was to "constitute a

strated for any intention of Congress that the state laws should not be preempted. Indeed, it appears that it was repeatedly suggested to Congress that if it wished to avoid preemption it should include an express saving clause in the Act—as has been included in various acts of Congress regulating commerce.²⁸ Congress did not do so, although, as the district court pointed out, “the bill was amended in many other respects after the hearings before both Committees had been concluded.” (R. 266; 239 F.Supp., at 23)

To turn to the specifics of the instances cited by appellants:

(a) To be sure, Congressman Harris stated on the floor of the House that he did not believe state laws would be affected by the bill, and the Report of the House Committee on Interstate and Foreign Commerce, of which he was Chairman, reflected his view. (H.R. Rep., p. 14) But the Senate Committee Report was pointedly silent on the question, and its silence is significant in view of the fact that the final form of the legislation was developed in the Senate. See *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956).—Most importantly, when Congressman Harris stated his conclusion on the floor of the House, he was immediately challenged by Congressman Smith, Chairman of the Rules

complete and final disposition” of the issues. (§ 3, Public Law 88-108)

²⁸ See Securities Act of 1933, §326, 53 Stat. 1177, 15 U.S.C. §77zzz; Securities Exchange Act of 1934, §28, 48 Stat. 903, 15 U.S.C. §78bb(a); Public Utility Holding Company Act of 1935, §21, 49 Stat. 834, 15 U.S.C. §79u; Investment Company Act of 1940, §50, 54 Stat. 846, 15 U.S.C. §80a-49; Federal Power Act, §27, 41 Stat. 1077, 16 U.S.C. §821; Communications Act of 1934, §221(a), (b), 48 Stat. 1080, 47 U.S.C. §221(a), (b); Part II of the Interstate Commerce Act, §202(c), 49 Stat. 543, 49 U.S.C. §302(b). Cf. *Garner v. Teamsters Union*, 346 U.S. 485, 501 (1953).

Committee, which had also considered the bill.²⁹ In the light of this strong contradiction of views, it is clearly impossible to ascribe Congressman Harris' interpretation of the bill's effect even to the House of Representatives. *Cf. FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

The brotherhoods seek to impugn Congressman Smith's important pronouncement on the supersession issue, contending that it was based on the "discredited" theory "that states cannot affect interstate commerce because of the commerce clause of the federal Constitution." *Appts. Br. No. 69*, p. 20.

Even a cursory reading of Congressman Smith's remarks reveals otherwise. He was not delivering a lecture on the effect of the Commerce Clause in the abstract. His statement was made in the course of a debate on the floor of the House concerning the advisability of a particular federal statute regulating an aspect of interstate commerce—the legislation which became Public Law 88-108. In this context, what Congressman Smith was clearly say-

²⁹ "MR. SMITH OF VIRGINIA. Mr. Speaker, the colloquy between the gentleman from California [Mr. Sisk], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. Harris], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

"I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

(footnote continued on next page)

ing was that if Congress did take action in this area (as it was about to do), the legislation thus passed would, under the Commerce Clause and the Supremacy Clause, override inconsistent state laws, such as the "full crew" laws.

(b) The other principal expression of "intention" relied on by appellants is the opinion of Secretary of Labor Wirtz that the administration-proposed legislation³⁰ would not preempt state laws. (Appts. Br. No. 69, p. 16) Indeed, most of the other expressions of "intention" referred to by appellants seem to be remarks of other witnesses or Congressmen simply quoting what Mr. Wirtz' opinion was. (Appts. Br. No. 69, pp. 18-19; 22)

But the fact of the matter is that shortly after Secretary Wirtz gave his opinion, he was challenged by several Congressmen who expressed a degree of incredulity as to his view:

"MR. EDMONDSON. Mr. Speaker, will the gentleman yield?

"MR. SMITH OF VIRGINIA. I yield to the gentleman from Oklahoma.

"MR. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point. Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

"MR. SMITH OF VIRGINIA. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce." (109 Cong. Rec. 16122 (1963)).

³⁰ In a recent letter to the Senate Committee on Commerce, Secretary Wirtz was pointedly noncommittal on the issue of the effect of the legislation in the form finally passed, on state laws: "The . . . letter [of one of the brotherhoods] also raises certain questions with respect to the application of Public Law 88-108 to State Full Crew laws. In view of the nature of this problem, and the state of current litigation on this matter, I would prefer to refrain from any comment." 1965 Senate Hearings, Tr. p. 7.

"MR. SIBAL: . . . Do I understand that it is your position that this bill would not supersede the States' full-crew laws?

"SECRETARY WIRTZ: Yes, sir.

"MR. SIBAL: And has a thorough job of legal research been done on this?

"SECRETARY WIRTZ: I indicated in my answer to a similar question earlier that the answer to the question of whether there is thorough research, the answer is 'no.'" (House Hearings, p. 111)

After a certain amount of further colloquy, Secretary Wirtz agreed to supply for the record a legal memorandum on the point.—Entirely contrary to the position taken by Secretary Wirtz at the hearing, the point of the legal memorandum was that it was quite possible for an ICC-promulgated interim work rule, under the administration bill, to supersede inconsistent state legislation! (House Hearings, pp. 112-13)³¹

* * * * *

Indeed, the most telling aspects of the legislative history, even on this level, support the judgment below. Incidental remarks in the legislative history are not as significant as what Congress did and what it consciously left undone. It made a conscious choice not to include a saving clause for state laws.

During the hearings on the bill proposed by the President, which would have assigned to the Interstate Com-

³¹ The memorandum in fact pointed out that the legislation would "appear to authorize the ICC to approve an interim work rule subject to the condition that it would not be applicable in any state where the law required otherwise" and that that technique could be followed to avoid supersession. (House Hearings, p. 112)

merce Commission similar responsibilities to those delegated under Public Law 88-108 to the Board, representatives of the Government several times brought to the attention of the House Committee that the bill did not contain a provision that would avert preemption of state crew consist laws, and that if the Congress did not intend such preemption a saving clause should be included." De-

³² "THE CHAIRMAN. I asked about that myself, Mr. Secretary. Is there anything in the Interstate Commerce Act which gives recognition to full-crew laws of the various States?

"SECRETARY WIRTZ. I would want to answer subject to check, but I think not.

"THE CHAIRMAN. It is my impression that there is not, but the courts have upheld full-crew laws in the various States.

"SECRETARY WIRTZ. That is correct.

"THE CHAIRMAN. That being true, I wish that you, if your counsel is with you, would point out to me anywhere in this resolution in which this would not supersede the full-crew laws or any other matters involved with work rules as contained in these notices.

"SECRETARY WIRTZ. I think to the best of our knowledge, there would not be anything specifically that had that result.

"THE CHAIRMAN. I agree with Mr. Sibal, then, that research would be necessary, because it would seem to me the logical conclusion is that this gives the Interstate Commerce Commission authority to supersede these laws.

"SECRETARY WIRTZ. I would respect your views, sir, completely on it."

(House Hearings, p. 111)

The question was again raised during testimony before the same committee by Mr. Robert W. Ginnane, General Counsel of the Interstate Commerce Commission, who analyzed the effect of the bill as then drawn on the state crew consist laws:

"MR. GINNANE. . . . It could be argued that if the Commission approves, for example, interim rules changing crew consist, that by virtue of paragraph 1 that would cut across State crew laws. I understand that the Secretary of Labor has testified here that that was not an intended result.

"THE CHAIRMAN. That is true.

"MR. GINNANE. If the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done simply by making clear in section 1, perhaps parenthetically that paragraph 11 is not to apply.

"THE CHAIRMAN. I appreciate your very frank response, because I think it has sort of been left up in the air as to what is intended

spite these references, as we have noted, no such saving clause was introduced, although the bill was repeatedly amended not only after the hearings but after the reports of the committees in each house.

Appellants attempt to negate the effect of these warnings by arguing that, instead of using a saving clause, Congress decided to employ an *ad hoc* arbitration board rather than the Interstate Commerce Commission in order to eliminate the possibility of preemption. (Appts. Br. No. 69, p. 22; Appts. Br. No. 71, p. 16) Since Congress could have clearly accomplished the same putative objective by simply inserting a saving clause, it seems a bit far-fetched that Congress made a radical change in the method for settling the dispute for that reason.—And, to be sure, the legislative background of this major revision completely rebuts appellants' position. The substitution was made in the Senate, where the committee report states clearly that the reasons for doing so were (1) that Congress did not want to create a compulsory arbitration

and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it so be directed. I believe you have covered the other notations that I have made already and there is no need to go over them again."

(House Hearings, p. 614)

Mr. Ginnane also cautioned in testimony before the Senate Committee on Commerce that if the Congress did not intend to preempt state crew consist laws, then an expression of intent to preserve the state laws should be included in the bill.

"Mr. GINNANE. . . . I heard the Secretary of Labor testify yesterday that that was not intended, that they did not intend, by drafting a bill which would authorize the Commission to take only interim action, valid for only 2 years, to brush aside the permanent State full-crew laws.

"If it desired to make that absolutely certain, if that is the desire of Congress, it can be done by just a phrase which would exclude paragraph 11 of Section 5 of the Interstate Commerce Act."
(Senate Hearings, pp. 400-01)

precedent for the entire transportation industry; (2) that the brotherhoods lacked confidence in the Interstate Commerce Commission;³³ and (3) that that agency was already overburdened with work. S. Rep., pp. 8-9. Since Congress could easily have prevented preemption by adding a saving clause, but apparently chose not to do so, the legislative history hardly supports appellants' position.³⁴

* * * * *

³³ Appellants imply that the reason the brotherhoods opposed arbitration by the Interstate Commerce Commission was to make certain that the state full crew laws would not be preempted. The record shows, however, that the real reasons for such opposition were that the brotherhoods had considerable doubt about the Commission's competency in this area, and still graver doubts as to its impartiality. Those were the arguments repeatedly asserted by union representatives, and relied upon by the Senate, which introduced this major revision of the legislation. See Senate Hearings, pp. 430, 432, 450-51, 469, 470-72, 490, 513-14, 581-82, 588-89, 600, 615-16, 618, 624-28, 630-33, 656-57; House Hearings, pp. 620, 621, 638-39, 649, 658, 674-75, 701, 703, 771, 796, 903, 933-34, 938, 990-94, 996-99, 1019-20.

³⁴ There is some suggestion in the brief for appellant brotherhoods that the only source of possible preemption in the proposals considered by Congress was the reference in the administration's proposal to § 5 of the Interstate Commerce Act, in that paragraph 11 of § 5 specifically allows the ICC to authorize the consummation of transactions approved by it under § 5 of the Act, contrary provisions of state law notwithstanding. (Appts. Br. No. 69, pp. 21-22) This express provision of § 5 is necessary since the Commission's approval powers under § 5 extend to a variety of subjects—such as mergers, the entry of foreign corporations into a state, etc.—which are generally considered to be peculiarly matters of state law. But certainly, when the context of the mechanics for the resolution of the rail dispute was changed from the Interstate Commerce Act to the Railway Labor Act by the Senate version of the legislation, the need for an express saving clause if supersession of state laws was not to follow was hardly obviated. For there are scores of cases teaching the preemptive effect of the basic Federal labor relations statutes—the National Labor Relations Act and the Railway Labor Act—on state legislation dealing with aspects of the labor-management relationship. Certainly it was still incumbent on Congress to add a saving clause, as was suggested on several occasions before Congress, if the normal effect of the legislation was to be averted.

In sum, the classic tests of legislative intent and purpose in this area—the background of the statute, the nature of the problem being dealt with, and the factors being resolved by the legislation—all unite, against the backdrop of this Court's decisions as to the effect of federal labor legislation, to support the conclusion that the compulsory arbitration law and the Awards rendered under it supersede inconsistent state legislation. Stray conclusionary remarks in the legislative history—many directed at a rejected form of the legislation—cannot indicate a contrary result, particularly in view of the failure of Congress affirmatively to respond to the repeated suggestion to it that a saving clause be inserted in the Act.³⁵

³⁵ Similarly, appellants place great emphasis on the remark in the opinion of the neutral members of Arbitration Board No. 282 that the Award would not cause immediate severe economic dislocations because of the existence of state full-crew legislation. (R. 121; 41 Lab. Arb., at 690) In the first place, it must be remembered that this statement in the opinion was only in the context of a recital of a number of reasons why the individual carriers would not be able “*immediately* to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews . . .” (*Ibid.*; emphasis supplied) The opinion, then, was concerned with what the “*immediate*” effects would be; and quite obviously, because of the necessity either of obtaining judicial declarations of the supersession of the state laws, or of obtaining their repeal, the “*immediate*” effect of the state laws would be, as a practical matter, to require the retention of firemen.

In any event, the question of preemption of state law was at most peripheral to the Board's duties and could hardly have been given meaningful consideration. What the Board did here—that is, the actual terms of its Award—is of considerably greater significance than the discussion in its opinion. The opinion itself reflects this; it expressly provided that in the event of any conflict between the opinion and the Award “the latter is, of course, intended to govern.” (R. 99; 41 Lab. Arb., at 681)

Indeed, an affirmative view of the Board's concept of its own powers with respect to state legislation is obtained from a reading of its discussion of the other crew consist issues. In supporting its decision to leave the resolution of these issues to the local Boards, the National Board observed that: “The consist of these crews, involving primarily helpers and road brakemen, has been deter-

D. Public Law 88-108 Permanently Supersedes the Arkansas Laws.

The two-year period provided by Section 4 of Public Law 88-108 during which the Award "shall continue in force" expires on January 25, 1966, as to the provisions relating to crew members, and on March 31, 1966, as to the

mined generally by local rules, practices, state full crew laws, or regulations issued by State Public Utility Commissions." (R. 128; 41 Lab. Arb., at 693) The Board's Opinion does not indicate that any of these sources of regulation is to be viewed in a different light from any of the others, and delegates the entire problem to the local Special Boards of Adjustment. State and local regulation, according to the guidelines in the Award, were simply a factor to be considered. (Award, para. III C(2)(i), R. 93; 41 Lab. Arb., at 679)

A similarly affirmative view of the Board's concept of its own powers may be derived from a supplemental opinion rendered by it, answering certain questions put by the parties to the Award, dated May 17, 1964, and filed in the United States District Court for the District of Columbia. *In re Certain Carriers*, Dkt. Misc. No. 41-63. There, in response to a complaint of the carriers that the brotherhoods were refusing to go through the procedure of exercising their 10% "veto," that is, their right to designate which 10% of the firemen's positions would be retained, insofar as "full crew law states" were concerned, the Board declared:

"The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award [R. 83-84] are the same in the so-called 'full crew law states' as in all other states."

While the question put to the Board was in the context of repeal or amendment of the state laws, the Board's answer does not appear to be so limited.

The fairest conclusion that can be drawn from the statements in the Award, the opinion of the neutral members, and the supplemental opinion, is that the Board was not taking any position on the effect of its Award on the state laws. This is precisely the view taken by the Chairman of the Arbitration Board in his 1965 testimony before the Senate Committee on Commerce:

"[T]here is the question of the effect of the Joint Resolution and the Award on the state full crew laws. As a Board, we have taken no position on this question. In answer to questions, we have held that the obligations and rights of the parties . . .

provisions relating to firemen. Thereafter, the terms fixed by the Award will be subject to change in the manner set forth in the Railway Labor Act, but will govern the relationships of the parties until so changed.

The District Court held that Public Law 88-108, together with the Award rendered under it, preempted the Arkansas laws permanently, thereby rejecting the contention of the appellants that whatever might be the situation during the two-year period specified in the Award pursuant to Section 4, thereafter those laws would again be operative. It is clear that the district court was correct, and that Public Law 88-108 preempts the state full-crew legislation not only during the present two-year period but permanently.

Congress cannot possibly have intended only a temporary supersession of the Arkansas laws.³⁰ First of all,

were the same in the so-called 'full crew' states as in all other states.

"But neither in that answer nor in any other interpretation have we purported to rule on the parties' obligations under state laws. This question, we believe, is for the courts to decide." (1965 Senate Hearings, Tr. pp. 878-79)

Clearly the local Special Board of Adjustment here was of the view that its powers extended to superseding state legislation. It obviously viewed its award as effective in Arkansas, even going so far as to prescribe that as to a certain specified Arkansas yard, the Paragould yard, no helpers whatsoever were to be required in switching operations—as opposed to the one helper generally required in its award, and the three helpers provided for by the state manning-level legislation of 1913. (R. 185; 42 Lab. Arb., at 921)

³⁰ Indeed, since the making of the Awards under Public Law 88-108, there has been a rapid trend to permanent repeal of the state laws; and a trend toward state court decisions holding them inapplicable to diesels—which, of course, corresponds with the coverage of the federal Awards. Thus, the laws in Arizona, California, and North Dakota were repealed by initiative or referendum at the November, 1964, elections (Ariz. Rev. Stat. § 40-853 (1965 Supp.); Cal. Labor Code §§ 6900.1-6903 (Dec. 1964 Supp.); N.D.

Congress fully realized that, if it imposed compulsory arbitration on the parties, the effects of any award thus rendered would extend far beyond two years. From its study of the far-reaching recommendations of the Presidential Railroad Commission and Emergency Board No. 154, Congress was aware that there was no short-range manner in which to resolve the manning controversy that had embroiled railroad labor relations in this country for over a decade. See Kaufman, *Working Rules in the Railroad Industry*, 5 Lab. L. J. 819 (1954); see also 1965 Senate Hearings, Tr. pp. 714-20. The recommendations of both of these groups showed conclusively that any contemplated solutions would include provisions requiring the railroads to spend millions of dollars in severance payments over a period of many years.³⁷ The debates on the

Code §§ 49-13-09 through 49-13-13 (1965 Supp.)); and Mississippi's and Oregon's legislatures repealed their laws in 1964 and 1965 respectively. (Miss. Code § 7759-61 (1964 Supp.)); Ore. Sess. Laws c. 462, § 1 (1965 Supp.)) The Texas courts have authoritatively held the Texas statute not to apply to diesels. *Texas v. Southern Pac. Co.*, 392 S.W.2d 497 (Tex. Civ. App. 1965) (alternative holding), *writ of error refused* "no reversible error," Texas Supreme Court. The Nevada Supreme Court has held likewise. *Southern Pac. Co. v. Dickerson*, 397 P.2d 187 (Nev. 1964). A similar result has been reached by a trial court in Nebraska. *Nebraska v. Thurston*, Dkt. No. 2410, District Court, Jefferson County, January 19, 1965. The Nebraska statute was thereafter repealed, August 4, 1965.

There is litigation pending in most of the other states having train manning-level statutes of any significance. In Indiana, the Superior Court, Marion County, granted a temporary injunction against enforcement of that state's Acts on February 3, 1965. An appeal is pending in that state's Supreme Court, Dkt. No. 30733. For the litigation in New York and Wisconsin, see note 8, p. 30, *supra*.

³⁷ For example, Emergency Board No. 154 recommended that firemen (other than those recently employed) with less than ten years' seniority be removed only if they were guaranteed comparable positions at the same wage for five years. With regard to

floor of the House and Senate likewise indicate that Congress fully appreciated these consequences of the proposed legislation. See 109 Cong. Rec. 15966-67 (1963); see also 109 Cong. Rec. 15903, 16133 (1963). Thus, when Congress directed the Board to make a "complete and final disposition" (Public Law 88-108, § 3) of the fireman and crew consist issues, it knowingly authorized a long-range solution, not one which could be cast aside two years later by reactivation of the full crew laws of a number of states.

The appellants' contention is that because the Act provides that the Award will "continue in force" for two years from its effective date, the preemptive effect of the legislation ends then. There are two basic reasons why this contention amounts to little more than a play on words. The first proceeds from the unique nature of collective bargaining contracts under the Railway Labor Act—into the mold of which Congress chose to pour the provisions for compulsory arbitration. The second relates to the far-reaching character of the Award itself—a character which Congress indeed contemplated it would have.

1. The short of the matter is that even though the Award "continue[s] in force" *as an Award* under the Act for a specified two years,³⁸ under the Railway Labor Act its terms remain as the measure of the rights and duties of the parties until changed in the manner provided by that Act. The Award may cease to "continue in force" as an Award; but the terms it fixed remain in effect unless

certain categories of firemen whose positions were eliminated, the Presidential Railroad Commission proposed monthly allowances for a three-year period. See generally Report to the President by Emergency Board No. 154, in House Hearings, pp. 46-47; Pres. Comm'n Rep., pp. 48-50, 59-60.

³⁸ And, hence, as something which must remain in effect "unless the parties agree otherwise." Section 4, Public Law 88-108.

changed as provided by law. That this was to be the case is evidenced by the fact that Congress, rather than integrating the compulsory arbitration law into the Interstate Commerce Act, chose to integrate it into the Railway Labor Act. The preamble of Public Law 88-108 emphasizes Congress' basic desire to resolve the dispute "in a manner which preserves and prefers solutions reached through collective bargaining."³⁹ (R. 76) Congress was able to accomplish this objective by specifically incorporating the mechanics of the Railway Labor Act, thereby placing the Award securely within that framework.

While the administration had proposed that compulsory arbitration be conducted by the Interstate Commerce Commission (R. 48-49),⁴⁰ Public Law 88-108 referred the controversy to an *ad hoc* arbitration board very much like those created in the case of voluntary submissions to arbitration under Section 7 of the Railway Labor Act. (R. 76-78) Accordingly, Section 4 of Public Law 88-108 provided that, to the extent feasible, arbitration be conducted, and the award made and filed, pursuant to Sections 7-9 of the Railway Labor Act. Whereas the administration measure provided for "interim" rules (§ 1) to "remain operative" for two years (§ 4), Section 3 of Public Law 88-108 provided that the Award should be a "complete and final

³⁹ The legislative history of Public Law 88-108 demonstrates the tremendous importance which Congress attached to the resolution of this and future railroad labor disputes through collective bargaining. See House Hearings, pp. 39, 60, 65, 109, 174, 559; Senate Hearings, pp. 47, 50, 55, 62, 371, 412, 655-56; S. Rep., pp. 3, 7, 9, 10; H.R. Rep., p. 13.

⁴⁰ As has been noted at pp. 53-54, *supra*, Congress decided not to use the Interstate Commerce Commission because of its desire to avoid a compulsory arbitration precedent for the entire transportation industry, opposition of the brotherhoods to that agency, and the existing workload of the Interstate Commerce Commission.

disposition" of the issues referred to the Board; it also provided—in the language that Section 8(j) of the Railway Labor Act uses as to the duration of awards on arbitration submissions under that Act—that the Award "shall continue in force" for a period, as provided in the Award, not exceeding two years. Thus, the joint resolution "adopt[ed] the time-tested provisions of the Railway Labor Act" to Congress' purpose. S. Rep., p. 3; see also S. Rep., p. 11; H.R. Rep., p. 14.

What Public Law 88-108 did then was to take the place of an arbitration agreement under Section 7 of the Railway Labor Act. In the words of the district court which upheld the Award, it "supplant[ed] an agreement to arbitrate." *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, 18 (D.D.C. 1964).—To be sure, unlike a traditional agreement to arbitrate, Section 7(a) of Public Law 88-108 imposed a specific requirement on the arbitrators to give due consideration to the effect of their Award on safety. But in all other respects, Congress directed the Board to render its Award pursuant to the terms of the Railway Labor Act.

The effect of keying Public Law 88-108 into the Railway Labor Act is clear. The entire framework of labor-management relations created by that Act negates the possibility of temporary supersession. Altogether unlike the case of employment terms and conditions in contracts negotiated under the National Labor Relations Act, the effect of employment terms and conditions provided for in agreements or arbitration awards in the railroad industry does not terminate on a fixed date. Instead, the Railway Labor Act requires that all terms of employment remain in effect at least until a notice of proposed changes has been given by one of the parties pursuant to Section 6 of the

Railway Labor Act. See also Section 2 Seventh.⁴¹ Even after that notice has been submitted, the status of the parties may not be altered until the Mediation Board has concluded its services, which may, at times, be protracted.⁴²

Thus, in the railroad industry even the terms of collective bargaining contracts providing for a fixed expiration date must continue in effect beyond that date, until changed as provided in the Railway Labor Act. *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964), *cert. denied*, 379 U.S. 817 (1964). By the same token, while arbitration awards, under Sections 7-9 of the Act, "continue in force" for the period agreed on by the parties in making their submission—and hence are not subject to change during that period—the terms they fix continue on the same basis as a collective bargaining contract thereafter—again, until changed in the method provided for in the Railway Labor Act.⁴³

⁴¹ See, e.g., *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964), *cert. denied*, 379 U.S. 817 (1964); *Pullman Co. v. Order of Ry. Conductors*, 316 F.2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963).

⁴² See *Brotherhood of Locomotive Engineers v. Morphy*, 109 F.2d 576 (2d Cir. 1940), and *Burke v. Morphy*, 109 F.2d 572 (2d Cir. 1940), *cert. denied*, 310 U.S. 635 (1940).

⁴³ Section 6 of the Railway Labor Act requires the parties to give "thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions." It is clear that the "agreements" referred to in Section 6 include agreements to arbitrate entered pursuant to Section 8 of the Act and the resulting arbitration awards. It would be illogical to treat the awards stemming from arbitration agreements differently from agreements reached through collective bargaining. In both cases, the terms of employment arrived at were intended to create a continuing status which could be revised only by taking the steps required by the Railway Labor Act. For that reason, the parties involved in the enactment of Public Law 88-108 considered that the arbitration Award rendered thereunder could only be modified according to the terms of the Railway Labor Act. See note 45, p. 63, *infra*.

The result is that the employer-employee relationship in the railroad industry is a unique blend of contract and status. The employment arrangement of the parties, whether created by contract or by arbitration as in the present case, is of a continuing nature.⁴⁴ The relationship remains in effect and may not be changed except as provided in the Railway Labor Act.

In enacting Public Law 88-108, Congress ordained that arbitration be conducted and that, as far as possible, the resulting Award be administered according to the terms of Sections 7, 8 and 9 of the Railway Labor Act. The unavoidable conclusion is that, like any other arbitration award or employment contract in the railroad industry, the Award rendered pursuant to Public Law 88-108 created a continuing status.⁴⁵

⁴⁴ Indeed, any unilateral attempt by either party to modify that arrangement without following the statutory procedure may be enjoined, notwithstanding the provisions of the Norris-La Guardia Act. See, e.g., *Manning v. American Airlines, Inc.*, *supra*, 329 F.2d, at 34; *Railroad Yardmasters v. Pennsylvania R. Co.*, 224 F.2d 226 (3d Cir. 1955).

⁴⁵ The legislative history indicates divergent views concerning the means by which that status could be changed. The Secretary of Labor believed that, if the parties had not fully resolved their dispute within the two-year period of the Award as such, the Section 6 notices given by them in 1959 and 1960 would remain in effect. See Senate Hearings, pp. 81-82. On the other hand, counsel for the Brotherhood of Locomotive Engineers considered that new Section 6 notices would have to be tendered at that time as a first step toward modification of the Award. See House Hearings, p. 682. What is significant, however, is that all parties concerned thought that any revisions would have to be effected pursuant to the terms of the Railway Labor Act. And see p. 68, *infra*.

Recent testimony by Assistant Secretary of Labor James J. Reynolds, before the Senate Committee on Commerce, also makes it clear that after expiration of the Award as such, the Railway Labor Act framework will govern the relationship of the parties:

"Keep in mind we still have the Railway Labor Act governing the way of life of these parties. The question is whether there

Thus, the initial benchmark for the relationship of the parties was to be set through the compulsory arbitration board, which was directed to take the public interest factors, including the safety factor, into account. As we have demonstrated, that federal action leaves no possible basis for the state laws. After the two-year period, while the manning levels established by the Award are subject to change in the manner provided by the Railway Labor Act, they remain in effect as the resolution of the matter until they are changed—that is, until an agreement is reached between labor and management to apply some other manning levels. Indeed, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen have, in practice, recognized this; they have recently served Section 6 notices on various crew consist issues, to cover the period after the two-year span of the Award runs. BLF & E Notices 2 & 3, Nov. 6, 1965; BRT Notice 1, Nov. 6, 1965.

Thus, there is absolutely no reason in this scheme for the revival of the state manning-level laws at the close of the two-year period, once the federally created authority of the Arbitration Board had determined, after considering the question of “adequate and safe transportation service,” that the manning level contemplated by these laws was not necessary. Indeed, it would be paradoxical—in view of the trend to lower, more realistic crew manning levels on the

will be new section 6 notices filed. The question is whether the organizations will say that the diesel rule of 1937 is being violated come March 1 of 1966, and you go through the normal procedure of the Railway Labor Act all over again with mediation, emergency boards and all the rest of it.”

1965 Senate Hearings, Tr. p. 999.

Representatives of the carriers testified at the 1965 hearings that new Section 6 notices were mandatory. 1965 Senate Hearings, Tr. pp. 1228, 1247.

railroads, as exemplified by the Report of the Presidential Commission, the Report of the Emergency Board, the repeal of several state manning-level laws,⁴⁶ and the Award under Public Law 88-108—to imagine that Congress intended that there would be a reversal of the trend and that after a two-year hiatus there would be a revival of the state manning-level laws.

2. Moreover, responsive to the obvious intent of Congress, the Arbitration Board made a far-reaching Award, whose most critical provisions—its extensive labor-protective provisions—are wholly inconsistent with the notion that the terms fixed by the Award would be a dead letter after two years, or that preemption of state manning-level laws would last only that time.

For example, under the job protection provision applicable to firemen, the carriers must pay very substantial severance allowances to the employees whom they are permitted to separate; and they must pay relocation allowances to others to whom they are required to offer other positions. Firemen employed from two to ten years may be separated from engine service only if they are offered a comparable job with guaranteed annual earnings for five years equal to their present compensation. If they decline the other position, they may be discharged but must receive a substantial severance payment. Award, para. II C(6), R. 86-87; 41 Lab. Arb., at 676-77.⁴⁷ Even those firemen hired

⁴⁶ See note 36, p. 57, *supra*.

⁴⁷ Moreover, such employees retain all accumulated seniority rights related to vacation and other fringe benefits, and any relocation expenses incurred by them must be reimbursed by the carriers. See p. 9, *supra*. (Award, para. II C(6), R. 86; 41 Lab. Arb., at 676)

within two years of the date of the Award, who took their jobs with full notice that their positions might soon be eliminated, are given liberal severance payments. Award, para. II C(2), R. 85; 41 Lab. Arb., at 676; Opinion of the Neutral Members, R. 125; 41 Lab. Arb., at 692.⁴⁸

As to each classification, the separation allowances decreed by the Arbitration Board are at least as generous, and, in many instances, more generous, than those suggested by the Presidential Railroad Commission—which recognized (see p. 5, *supra*) that its recommendations were inconsistent with the continued validity of state minimum manning-level legislation. As of September 1965, the carriers had already made severance payments in excess of \$36,000,000 pursuant to the Award.⁴⁹

Plainly, provisions of this kind evidence an intent to provide for long-range relief. It would be an absurdity to hold that Congress intended the railroads, after they had paid millions of dollars in severance pay to employees, to rehire them after the two-year period or to employ others in the jobs declared by the Award to be superfluous. The

⁴⁸ Firemen holding their jobs for two years prior to the Award are to receive severance payments equal to their total salaries for six months; those employed one to two years are given full pay for three months; and even employees who have been on the job less than a year are entitled to a lump sum equal to five days' pay for each month in which they worked. (R. 125; 41 Lab. Arb., at 692)

⁴⁹ As of that time, some 4,465 firemen with two to ten years' seniority had opted to accept severance pay averaging \$6,000 per man. 1965 Senate Hearings, Tr. p. 1297. Some of the allowances in this category ranged up to \$9,800 per man. *Id.*, at 1449. The average amount paid to 4,600 separated firemen who had been on the job less than two years was \$1,425. *Id.*, at 1451-52. In addition, 1,175 part-time firemen had received allowances averaging \$2,750. *Id.*, at 1451.

purpose of Congress, and of the Award, was certainly not to provide a two year's vacation with pay.

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In sum, the Award was limited—as is any Railway Labor Act award—only in the time in which it was binding upon the parties in the sense that they could not seek to initiate the Railway Labor Act procedures, and, ultimately, use economic methods of self-help to bring about a change in it. The fact remains that the compulsory arbitration law effected a radical, dispositive, and continuing solution on a national basis to what was essentially a national problem. When Congress enacted Public Law 88-108 and thus sanctioned a solution inconsistent with the state laws, the status quo was completely altered. It would be totally disruptive of peaceful labor relations—and of the fabric of the Railway Labor Act—to hold that upon the expiration of the Award, the Railway Labor Act framework for the revision of its terms may be totally disregarded and that, instead, the state laws may resume their effect.

II. EVEN IF THE SOLUTION PROVIDED FOR IN THE AWARD HAD BEEN REACHED THROUGH THE COLLECTIVE BARGAINING PROCESS, THAT SOLUTION WOULD HAVE SUPERSEDED THE ARKANSAS LAWS BY REASON OF THE RAILWAY LABOR ACT AND THE NATIONAL TRANSPORTATION POLICY

In Part I, our argument was based to a considerable extent on the fact that the solution reached in the Award was the work of public bodies—the Arbitration Boards—applying public-interest standards laid down by Congress. In this part, we shall demonstrate that even if the solution had been reached through a collective bargaining contract provided for under the Railway Labor Act, it would have—by reason of that Act and the National Transportation Policy—super-

seded inconsistent state legislation defining crew manning levels.¹

In 1931, this Court summarily dismissed an argument that the Arkansas laws were preempted by the enactment in 1926 of the Railway Labor Act. The Court's entire treatment of the subject was as follows: "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration." *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249, 258 (1931). Since that time, however, Congress has enacted comprehensive legislation dealing with labor-management relations generally,² as well as far-reaching laws governing employer-employee relations in the railroad industry. See Amended Railway Labor Act of 1934, 48 Stat. 1185, 45 U.S.C. §§ 151 *et seq.*; National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1. As a result, this Court has frequently been called upon to reexamine the question of the effect on state laws of the comprehensive federal enactments in the labor-management relations field, and the contours of the labor preemption doctrine have been significantly expanded. See the cases collected at pp. 23-24, *supra*. Moreover, and most significantly, at the time of the *Norwood* decision, there was no agreement or award in effect under the Railway Labor Act inconsistent with the state manning-level laws³—as opposed to the situation today.

¹ This argument, moreover, is a further proof of the point we make in Part I D above—that even after the period in which the Award "continues in effect" under § 4 of Public Law 88-108, the state manning-level laws are superseded.

² See Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101 *et seq.*; National Labor Relations Act, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 73 Stat. 519 (1959), 29 U.S.C. §§ 141 *et seq.*

³ While there were agreements in states other than Arkansas at the time of the *Norwood* case which provided for manning levels

1. Since the time of the *Norwood* decision, Congress has so extended its regulation of the labor-management relations of railroads engaged in interstate commerce "as to take possession of the field" (*Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919)) covered by the Arkansas manning-level laws. In response to extensive criticism leveled at the Railway Labor Act of 1926, Congress amended the Act in 1934 to establish the National Railway Adjustment Board as a means of assuring the orderly settlement of "minor disputes." As a last resort, such disputes arising out of the interpretation and application of existing employment contracts were to be resolved by compulsory arbitration. Section 3. The amendments also added important provisions requiring the carriers to bargain collectively with employee representatives. (Section 2 First, Ninth; see, e.g., *Virginian R. Co. v. System Federation No. 40*, 300 U.S. 515, 547-48 (1937)) Thus, the 1934 Act imposed specific duties on all carriers "to treat with" union representatives, and added a number of other provisions designed to develop the framework of collective bargaining. Section 2 Fourth, Seventh, Eighth.

lower than those in effect in Arkansas, there was no such agreement applicable in Arkansas. See Appellants' Reply Brief, p. 39, *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249 (1931). Likewise, the case of *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), much relied on by appellants, did not involve any agreement or award inconsistent with state law.

We do not mean to suggest that our contention as to supersession by the Railway Labor Act and the National Transportation Policy would not be effective even if there were no agreement inconsistent with the state laws. The presence of these state laws, directly regulating the central labor-management controversy in the railroad industry, is an obvious block to the nationwide free collective bargaining solution of labor-management problems envisioned by that Act, and we would submit that even on this basis the local laws should not stand. However, the point is that, as a matter of fact, there is presently in effect an agreement or award inconsistent with the state laws.

With the coming of such a comprehensive framework for the resolution of labor-management disputes in the railway labor field—as there has come also in labor relations generally under the National Labor Relations Act—there has been an increasing recognition of the exclusive force of the federal legislation, superseding inconsistent state laws. This is, as we have touched on above (pp. 24-27, *supra*), particularly the case as to the effect of collective bargaining contracts entered into pursuant to the federal statutes. This Court has “on numerous occasions . . . recognized that the Railway Labor Act protects and promotes collective bargaining.” *California v. Taylor*, 353 U.S. 553, 559 (1957). Indeed, two of the stated purposes of the Railway Labor Act—added by the 1934 amendment—are “to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act” and “to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions.” (Section 2) The Act, then, basically envisions a regime of joint, private autonomy involving the carriers and the employees—assisted by federal mediation and arbitration services—in working out the details of their labor-management relationship.⁴

⁴ A perceptive commentator once described the railroad world for which the Railway Labor Act was designed thus: “The railroad world is like a state within a state. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established.” Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937). As Mr. Justice Frankfurter pointed out, after quoting from that commentary: “The Railway Labor Act of 1934 is an expression of that ‘reign of law’ and provides the means for maintaining it. . . . It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions

The regime of joint, private autonomy envisioned by the Railway Labor Act is not to be disrupted by state laws impinging on labor-management relationships.* The key case in this area is *California v. Taylor*, 353 U.S. 553 (1957), where the ultimate issue presented was the applicability of the Railway Labor Act to a state-owned railroad. At the outset, the Court stated unequivocally that, if the public railroad were subject to the federal law, any collective bargaining agreements it reached "would take precedence over conflicting provisions of the state civil service laws." 353 U.S., at 561. Then, notwithstanding the absence of any specific reference to state railroads in the Railway Labor Act, the Court went on to hold unanimously that that Act superseded state legislation prohibiting collective bargaining by public employees and defining various aspects of their employment conditions.

The thrust of the decision is that uniform regulation of labor-management relations in the railroad industry, as achieved through the collective bargaining process, is imperative. The opinion emphasizes that collective bargaining by the railroads is generally regional or national in scope. For that reason, the Railway Labor Act is also "all-embracing in scope and national in its purpose, [and] . . . is as capable of being obstructed by state as by individual

and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 752 (1945) (dissenting opinion).

* A recent state court decision upholding full-crew legislation candidly admitted: "Perhaps, with respect to the regulation of working conditions, not related to health or safety, the field had already been preempted by the provisions of the Railway Labor Act, leaving such regulation to bargaining agreements between employee and employer." *New York Central R. Co. v. Lefkowitz*, 46 Misc.2d 68, 98, 259 N.Y.S.2d 76, 107 (Sup. Ct. 1965).

action.' " 353 U.S., at 566. If the agreements reached thereunder were subject to divergent state and local laws restricting their contents, a chaotic state of affairs would inevitably result. The Court therefore concluded that Congress must have "intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force." 353 U.S., at 567. See also *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).⁶

The state civil service laws as to promotions, layoffs, dismissals, overtime and pay scales which purportedly applied to the state-owned railroad in *California v. Taylor* could not stand in the face of an inconsistent collective bargaining contract under the Railway Labor Act. So also, the provisions of a state law which attempts to fix the number of men a private railroad must employ—as do these Arkansas laws—may not stand in the face of an inconsistent standard—whether in the form of a collective

⁶ *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), was a suit to enforce the award of a system board of adjustment established by agreement of the parties in accordance with § 204 of the Railway Labor Act. In holding that a federal question was presented so as to vest jurisdiction in the federal courts, this Court once again stressed the importance of uniform treatment of contracts entered pursuant to the Railway Labor Act.

"If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity." 372 U.S., at 691-92.

Cf. Jerome v. United States, 318 U.S. 101, 104 (1943).

bargaining contract or an arbitration award—made under the Railway Labor Act.

Application of the full-crew laws presently on the books in seven states would effectively destroy the very uniformity that the Railway Labor Act was designed to create. Any negotiations between the railroad companies and the appellant brotherhoods for modification of the Awards made pursuant to Public Law 88-108, or for the revision of other terms of the present employment contracts, will be primarily national in scope. The agreements so reached would, however, be made subject to an unfortunate variety of state manning-level statutes, if they were applicable.⁷ *Cf. Mor-*

⁷ One authority graphically illustrates the dimensions of the problem:

"Variations in the size of the crews from state to state dramatize the anomaly of the full-crew laws. Great Northern's fast transcontinental freight, No. 401, runs from St. Paul-Minneapolis to the North Dakota state line with two brakemen. At Breckinridge, Minnesota, the last division point in Minnesota, the train picks up a third brakeman because North Dakota has a full-crew law. When it reaches the Montana border, the third brakeman is dropped, and all through the mountains of Montana and Idaho, No. 401 operates with two brakemen. Then when it reaches the Washington border the train takes on a third brakeman, since Washington also is a full-crew state . . . Somewhat more than half of the laws . . . have compelled increases [in the number of crew members used]. Texas, Nebraska, Wisconsin, and Mississippi require five men on all trains no matter how short; Washington requires not less than six men on any freight train of 25 or more cars. New York requires a crew of five on most trains, but a crew of six on passenger trains of six or more cars." Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management* (1960), p. 324. [A number of the statutes referred to have been repealed or enjoined.]

As of August 1, 1965 the following crew consist statutes were on the statute books: Ark. Stat. Ann. §§ 73-720 through 722, 73-726 through 729 (1957); Ind. Stats. §§ 55-1327 through 1334 (1951); Mass. Ann. Laws c. 160, § 185 (1959); Neb. Rev. Stat. §§ 74-532 through 537 (1958); Nev. Rev. Stats. § 705.390 (1963); N.Y. Railroad Law §§ 54-a, 54-b, 54-c (1952); Ohio Rev. Code §§ 4999.06-

gan v. Virginia, 328 U.S. 373 (1946). There can be no doubt that, if the "full-crew" laws remain operative, employment agreements reached through collective bargaining on the national level, as well as national arbitration awards, would nonetheless vary considerably in effect from state to state.^{*} There can be no question that this is the type of chaotic divergence which Congress sought to eliminate when it passed the Railway Labor Act.

2. Appellants claim that, rather than falling within the general rule requiring preemption, the challenged Arkansas laws fall within an exception permitting state health and safety legislation to remain in effect. While there is a legitimate question as to whether in the light of the present state of railway technology, the high manning levels imposed by the Arkansas laws have anything to do with safety, it would be fatuous to deny that they have a very great deal to do with the direct regulation of labor-management relations. As we pointed out in Part I, they seek to

.08 (1954); Tex. Civ. Stats., Art. 6380 (1926); Wash. Rev. Code §§ 81.40.010-.030; Wis. Stats. §§ 192.25-.26 (1957). Maine has a statute that applies only to steam-powered passenger trains. Me. Rev. Stat. C. 46, § 60 (1954).

Of the statutes mentioned above, as we have developed in note 36, p. 57, *supra*, enforcement of the Nebraska, Nevada and Texas statutes has been suspended by judicial decree on state-law grounds, leaving seven, including the Arkansas, which apparently will be affected by the outcome of this litigation. The Nebraska statute was subsequently repealed. There has been a lower state court injunction against enforcement of the Indiana statute; and litigation is pending, in other postures, in New York and in Washington, directed to those states' statutes.

^{*} Moreover, there is no guarantee that only states will enact laws in this area. Local ordinances dealing with crew consist are by no means unheard of. See *Weinberg v. Northern Pac. R. Co.*, 150 F.2d 645 (8th Cir. 1945); *Louisville & N. R. Co. v. City of Hazard*, 304 Ky. 370, 200 S.W.2d 917 (1947).

regulate the present central labor-management controversy in the railroad industry.

Accordingly—even apart from the fact that in Section 7(a) of Public Law 88-108 Congress regulated the safety aspects of the matter⁹—state laws which so directly regulate labor-management relations, already so extensively dealt with by the federal act, should not stand. Whatever safety problems may be thought to inhere in the question of crew manning levels on the railroads should be left to whatever federal legislation Congress might ever conclude was warranted.

The National Transportation Policy, set forth by Congress in 1940 (54 Stat. 899, 49 U.S.C. preceding § 1) makes it clear that Congress has recognized the need—and the federal responsibility—for promoting “safe, adequate, economical and efficient service” in the transportation field.¹⁰ In the light of this undertaking, whatever limits that are

⁹ See pp. 37-43, *supra*.

¹⁰ This Court has recently emphasized the importance of the National Transportation Policy, pointing out that none of its provisions may be disregarded, since they constitute part of an operative national policy. See *ICC v. New York, N.H. & H. R. Co.*, 372 U.S. 744, 761-62 (1963); *A. L. Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375, 386-88 (1964). Thus, in striking down an Arizona law regulating train lengths as an unconstitutional burden on interstate commerce, the Court determined that the statute was of dubious value as a safety measure, and stressed the impairment of the National Transportation Policy which would result if the legislation were allowed to stand:

“[The Arizona Train Limit Law] materially impedes the movement of appellants’ interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act preceding § 1, 54 Stat. 899.”

Southern Pac. Co. v. Arizona, 325 U.S. 761, 773 (1945). Cf. *Order of Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U.S. 330, 333, 342 (1960).

to be imposed on the parties' solution of crew manning-level questions in the name of safety should be imposed by federal law—just as, in the *Oliver* case, the limits to be imposed in the name of antitrust policy on the restrictions on which the parties to a labor-management contract could impose, were left to federal law. 358 U.S., at 296.

Congress has enacted a variety of provisions to ensure safety on the nation's railroads.¹¹ Despite the fact that crew manning-level laws are presently in effect only in a minority of the states, Congress has never seen fit to enact any federal legislation, in the name of safety or otherwise, as to this matter.¹² Under these circumstances, and in view of the direct orientation of laws of this nature to the central problems of labor-management relations, and their peripheral relationship to safety, we submit—even apart from the effect of Section 7(a) of Public Law 88-108—that the state laws in this area are so intertwined with the subject of labor-management relations which Congress has taken in hand that they cannot stand.

¹¹ See Accident Reports Act, 36 Stat. 350, as amended, 45 U.S.C. §§ 38-43; Ash Pan Act, 35 Stat. 476, as amended, 45 U.S.C. §§ 17-21; Automatic Coupler Act, 27 Stat. 531, as amended, 45 U.S.C. §§ 1-10; Boiler Inspection Act, 36 Stat. 913, as amended, 45 U.S.C. §§ 22-34; Hours of Service Act, 34 Stat. 1415, as amended, 45 U.S.C. §§ 61-66.

¹² Indeed, numerous attempts have been made to persuade Congress to pass federal "full crew" legislation, but Congress has apparently not wished to do so. See Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 59, 74th Cong., 1st Sess. (1935). See also S. 4234, H.R. 10885, H.R. 11012, 72d Cong., 1st Sess. (1932); S. 2624, S. 2993, H.R. 7489, 73d Cong., 2d Sess. (1934); S. 152, H.R. 144, 75th Cong., 1st Sess. (1937).

III. THE ARKANSAS LAWS AMOUNT TO AN UNCONSTITUTIONAL DISCRIMINATION AGAINST INTERSTATE COMMERCE

In this part we shall demonstrate that even apart from the contentions we made in Parts I and II, the Arkansas laws cannot stand because they amount to an impermissible discrimination against interstate commerce.¹ The basic reason why these laws effect an unconstitutional discrimination against interstate commerce lies in their pattern of coverage. The laws contain exceptions which, while phrased in general terms, in practice exempt all the intrastate railroads from the legislation while including the great majority of the interstate railroads.

As reviewed in the Statement, p. 16, *supra*, ten of the eleven interstate railroads operating in the state have over fifty miles of track and thus must comply with the freight train manning-level legislation of 1907; and eight of the eleven interstate railroads have over one hundred miles of track each and are hence subject to the switching crew manning-level legislation of 1913. On the other hand, the proofs indicate that none of the state's seventeen intrastate railroads is subject to either of the two state laws.

¹ We also urged in the district court that these laws constitute an impermissible burden on interstate commerce. Since this contention would involve the putting in of proofs as to the nature and extent of the burden on interstate commerce, and the lack of any redeeming state interest in the legislation of a comparable nature (see *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945)), which proofs have not yet been put in, we do not urge this point in this Court, but will of course pursue it in the district court should this Court not agree with our contention that the judgment below should be affirmed. We would also pursue in the district court our contentions under the Fourteenth Amendment. Cf. *Pennsylvania R. Co. v. Driscoll*, 330 Pa. 97, 198 Atl. 130 (1938), 336 Pa. 310, 9 A.2d 621 (1939); *Weinberg v. Northern Pac. R. Co.*, 150 F.2d 645 (8th Cir. 1945).

The extent to which the pattern of coverage of these laws discriminates against the interstate carriers is vividly illustrated by the fact that, viewed in terms of trackage in Arkansas, 99.85% of the interstate railroad mileage is subject to the 1907 legislation, and 99.32% is subject to the 1913 legislation. (Plaintiffs' Ex. 6, R. 203) On the other hand, literally none of the trackage of the intrastate railroads is subject to either of the two Acts. Thus, the two Acts fall only slightly short of perfection in effecting a discrimination against the interstate carriers.

1. It is absolutely clear that discrimination of this nature against interstate commerce is forbidden. As early as 1879, this Court stated that:

"[I]t must be regarded as settled that no State can, consistently with the Federal Constitution, impose on the products of other States brought therein for sale or use, . . . or the transportation thereto of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

Guy v. Baltimore, 100 U.S. 434, 439 (1879). That principle has been steadfastly followed over the years. See, e.g., *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).² Furthermore, it has been applied just as strongly against state laws enacted

² While the rule forbidding discrimination against interstate commerce has been invoked most often in tax cases, it is logically insupportable to limit the prohibition to revenue legislation—as the appellants urged below—and the courts have never restricted the rule to that context. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Hussey v. Campbell*, 189 F.Supp. 54, 59 (S.D. Ga. 1960), *aff'd on other grounds*, 368 U.S. 297 (1961). Cf. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964).

to promote the public safety, when shown to be discriminatory in nature. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 379-80 (1939); *Brimmer v. Rebman*, 138 U.S. 78, 81-82 (1891). Thus, even assuming that the Arkansas laws were perfectly valid safety regulations, that status would be insufficient to save them from the charge of discrimination against interstate commerce.

It goes without saying that even though state legislation such as that enacted by Arkansas may appear on its face to treat interstate and intrastate carriers equally, it is nonetheless unconstitutional if its effect is discriminatory: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). See also *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

2. The Arkansas laws may not be sustained on any supposition that there is a rational basis, not referable to simple discrimination between interstate and intrastate carriers, for their pattern of coverage. The fact of the matter is that clearly there is no basis for the exemptions in terms of the supposed safety considerations which are said to have prompted the laws.

(a) This is vividly demonstrated by the switch crew manning-level legislation of 1913. That legislation exempts carriers with less than one hundred miles of track from its coverage. But switching operations are by their very nature local; the same sorts of hazards inhere in them without regard to how many miles of main line track the

carrier has. The hazards of a switching operation in Arkansas are the same whether the main line of the carrier running the switching operation in question runs only to a connection with the line of another carrier twenty miles away, or whether the carrier running the switching operation happens itself to be a transcontinental railroad. This obvious fact has been recognized judicially: "[I]t would seem that the dangers inherent in switching operations are equally great on short line roads as on roads of greater length." *New York Central R. Co. v. Lefkowitz*, 46 Misc.2d 68, 95, 259 N.Y.S.2d 76, 105 (Sup. Ct. 1965).

(b) The irrationality of the exemption provided by the 1907 legislation relating to freight train crew manning levels is a little less obvious, but just as real. It is true that freight train manning-level requirements may bear some relationship to the length of train runs. Indeed, the local Special Board of Arbitration here recognized this by requiring two brakemen on main line operations, and one on branch lines. See p. 13, *supra*. But the Arkansas exemption is not related to the length of the particular freight train movement, or to main lines and branch lines, but is related only to the total length of a carrier's lines. The exemptions thus are completely out of phase with any basis for them. An intrastate carrier with a line of forty-five miles, making main line runs over its entire line, is exempt from the legislation. An interstate carrier with over fifty miles of line is subject to the legislation on all its freight train movements within Arkansas, including branch line operations of the shortest nature.⁸

⁸ The discriminatory nature of the 1907 legislation is made clearer by the fact that the Arkansas courts have construed it as being applicable to interstate railroads even though they have less than fifty miles of track in Arkansas, if their overall system mileage exceeds fifty miles. See *Kansas City Sou. R. Co. v. Arkansas*, 116

Accordingly, the Arkansas freight train manning-level laws must likewise be considered an impermissible discrimination against interstate commerce. The decisions of this Court teach that, even in the case of a generally permissible state regulation which has an incidentally discriminatory effect against interstate commerce, the state legislation is forbidden "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). So here, Arkansas might have enacted a non-discriminatory freight crew manning-level law with exemptions based on the length of the movement⁴ rather than using the virtually irrelevant factor of total length of the carrier's track. In the light of the nondiscriminatory alternatives plainly available, the 1907 legislation cannot stand. *Cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959).

3. The effect of these two discriminatory laws is clear and substantial. Through collective bargaining with the very labor organizations that have intervened in this litigation, the exempted intrastate carriers have been able to fix significantly smaller crew consists than those required

Ark. 455, 174 S.W. 223 (1915). Thus, if there were two carriers running between a city twenty-five miles inside Arkansas and a point on the Arkansas state line, and one carrier's line stopped there and the other carrier's line continued on for more than twenty-five miles in the neighboring state, the interstate carrier would be subject to the 1907 Act and the intrastate carrier would not, although their operations in Arkansas were identical. This would be the case even if the intrastate carrier made a through connection with the interstate carrier at the state line. *Cf. Kansas City Sou. R. Co. v. Arkansas*, 213 Ark. 906, 214 S.W.2d 79 (1948).

⁴That is, it might have enacted such a law apart from the considerations urged in Parts I and II.

by the two laws. (Plaintiffs' Exs. 9, 13 and 14, R. 208-09, 221-22, 222-24.)

It is one thing for a state to have full crew laws in order to maintain safety—or frankly to assure a maximum number of jobs for its railroad workers—but quite another if such legislation is drafted in a manner that will make it applicable only to interstate carriers, with local railroads left completely unfettered. In such situations, “provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.” *Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946). *Cf. King v. United States*, 344 U.S. 254 (1952). Since they effect an impermissible discrimination against interstate commerce, the Arkansas laws cannot stand.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

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November, 1965

APPENDIX I

The Commerce Clause

United States Constitution, Article I, Section 8, Clause 3:

"The Congress shall have Power—

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

APPENDIX II

The National Transportation Policy

The National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C. preceding § 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act [The Interstate Commerce Act], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of

the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act [The Interstate Commerce Act], shall be administered and enforced with a view to carrying out the above declaration of policy."

APPENDIX III

The Railway Labor Act

Sections 2 and 5 through 10 of the Railway Labor Act of 1926, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151a, 152, 155-60:

"§ 2. GENERAL PURPOSES.

"The purposes of this Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"First. Duty of carriers and employees to settle disputes.

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and

maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. Consideration of disputes by representatives.

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Designation of representatives.

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. Agreements to join or not to join labor organizations forbidden.

"No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has

been discarded and is no longer binding on them in any way.

"Sixth. Conference of representatives; time; place; private agreements.

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. Change in pay, rules, or working conditions contrary to agreement or to section six forbidden.

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Notices of manner of settlement of disputes; posting.

"Every carrier shall notify its employees by printed notices in such form and posted at such times and places

as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the

Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. Violations; prosecution and penalties.

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his

labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

"Eleventh. Union security agreements; check-off.

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assess-

ments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 3 of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a

member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further, That* nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

• • • • •

"§ 5. FUNCTIONS OF MEDIATION BOARD.

"First. Disputes within jurisdiction of Mediation Board.

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said

Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. Interpretation of agreement.

"In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents.

"The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

"(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

"If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

"(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

"(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the par-

ties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

"(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

"(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each con-

tract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

“(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

“§ 6. PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS

“Carriers and representatives of the employees shall give at least thirty days’ written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

"§ 7. ARBITRATION.

"First. Submission of controversy to arbitration.

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 1-6 of this Act such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

"Second. Manner of selecting board of arbitration.

"Such board of arbitration shall be chosen in the following manner:

"(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

"(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

"Third. Board of arbitration; organization; compensation; procedure.

"(a) Notice of selection or failure to select arbitrators.

"When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

"(b) Organization of board; procedure.

"The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

"(c) Duty to reconvene; questions considered.

"Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

"Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

"(d) Competency of arbitrators.

"No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

“(e) Compensation and expenses.

“Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

“(f) Award disposition of original and copies.

“The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

"(g) Compensation of assistants to board of arbitration; expenses; quarters.

"A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

"Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

"(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; compulsion of witnesses; fees.

"All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas.

In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Interstate Commerce Act as amended.

"Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

"§ 8. AGREEMENT TO ARBITRATE; FORM AND CONTENTS; SIGNATURES AND ACKNOWLEDGMENT; REVOCATION.

"The agreement to arbitrate—

"(a) Shall be in writing;

"(b) Shall stipulate that the arbitration is had under the provisions of this Act;

"(c) Shall state whether the board of arbitration is to consist of three or of six members;

"(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

"(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

"(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

"(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

"(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

"(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

"(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

"(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings

shall constitute the full and complete record of the arbitration;

"(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

"(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

"(n) Shall provide that the respective parties to the award will each faithfully execute the same.

"The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

“§ 9. AWARD AND JUDGMENT THEREON; EFFECT OF ACT
ON INDIVIDUAL EMPLOYEE.

“First. Filing of award.

“The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

“Second. Conclusiveness of award; judgment.

“An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

“Third. Impeachment of award; grounds.

“Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

“(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

“(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

“(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a

party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

"Fourth. Effect of partial invalidity of award.

"If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

"Fifth. Appeal; record.

"At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

"Sixth. Finality of decision of court of appeals.

"The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

"Seventh. Judgment where petitioner's contentions are sustained.

"If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

"Eighth. Duty of employee to render service without consent; right to quit.

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent.

"§ 10. EMERGENCY BOARD.

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential

transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

"There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 69 and 71

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
—v.— *Appellants,*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, ET AL.,
Appellees.

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR THE
SEVENTH JUDICIAL CIRCUIT OF ARKANSAS, ET AL.,
Appellants,

—v.—
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

**BRIEF OF ASSOCIATED RAILWAYS OF INDIANA,
ASSOCIATED RAILROADS OF MASSACHUSETTS,
NEW YORK STATE ASSOCIATION OF RAILROADS,
OHIO RAILROAD ASSOCIATION, TEXAS RAILROAD
ASSOCIATION, WASHINGTON RAILROAD ASSOCIA-
TION AND WISCONSIN RAILROAD ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

This case presents the question whether the enactment
by Congress of Public Law 88-108, 77 Stat. 132, 45 U. S. C.
following Sec. 157, the Award of Arbitration Board No.

282 and the local Awards by the Special Boards of Adjustment pursuant thereto (the "federal regulation") have superseded the Arkansas statutes prescribing crew consists of freight trains and yard assignments.

The Associated Railways of Indiana, Associated Railroads of Massachusetts, New York State Association of Railroads, Ohio Railroad Association, Texas Railroad Association, Washington Railroad Association and Wisconsin Railroad Association, which have submitted this *amici* brief, represent the railroads in the other states having crew consist laws.¹ The determination of the issue of preemption by this Court will undoubtedly be dispositive of this issue in suits which are now pending in several of these states.² This case is therefore of vital and immediate concern to the Associations and their members.

¹Ind. Stats. §§ 55-1326 through 1338 (1951); Mass. Ann. Laws, c. 160 §§ 154 and 185 (1959); N. Y. Railroad Law §§ 54-a, 54-b, 54-c (1952); Ohio Code §§ 4999.06-.08 (1954); Tex. Civ. Stats. Art. 6380 (1926); Wash. Rev. Code §§ 81.40.010-.030 (1962); Wis. Stats. § 192.25 (1957). In addition there are also crew consist laws in Maine and Nevada. Me. Rev. Stat. c. 46, § 60 (1954); Nev. Rev. Stats. §§ 705.390-.420 (1963). However, the statute in Maine applies solely to passenger trains "moved by steam." The crew consist laws in Texas and Nevada have been held not to require the assignment of firemen on diesel locomotives. *Southern Pacific Company v. Dickerson*, 397 P. 2d 187 (Sup. Ct. Nev. 1964); *Texas v. Southern Pacific Co.*, 392 S. W. 2d 497 (Tex. Civ. App. 1965), writ of error refused (Sup. Ct. Tex. 1965).

²A temporary injunction against enforcement of Indiana's crew consist laws has been granted by the lower court in Indiana. *New York Central R. Co. v. Public Service Com'n. of Indiana* (Super. Ct. Marion Co. Feb. 3, 1965). An appeal from that decision is now pending in the Indiana Supreme Court, No. 30733.

A lower court in New York has held that that state's full crew laws are not preempted. *New York Central R. Co. v. Lefkowitz*, 46 Misc. 2d 68, 259 N. Y. S. 2d 76 (Sup. Ct. Westchester Co. 1965). However, another court of the same state has held that these laws have been superseded by the federal regulation. *Switchmen's Union v. Erie-Lackawanna R. Co.* (Sup. Ct. Erie Co. 1965). Both decisions are now pending on appeal.

An action by the railroads to declare the Ohio full crew laws unconstitutional is scheduled for trial in the Court of Common Pleas,

STATEMENT

Congress enacted Public Law 88-108 to resolve the impasse between the nation's Railroads and the Brotherhoods over the issues of manning levels of freight trains and switch crews. This impasse, which had been developing over a number of years, had reached such a crucial stage that in the summer of 1963 the country was faced with a nationwide strike. To put an end to this dispute Congress directed that a national Arbitration Board be established for the purpose of making a binding award which was to "constitute a complete and final disposition of the aforesaid issues." (§ 3, R. 77)

The scope of authority delegated by Congress to the Board was all inclusive and embraced the subject matter covered by state full crew laws. In making its determination of crew consists the Board was specifically directed to take into consideration the "effect of the proposed award upon adequate and safe transportation service." (§ 7(a), R. 78) In addition to the factor of safety, the Board was also directed to consider the "effect of the proposed award upon the interests of the carrier and employees affected." (§ 7(a), R. 78) Finally, Congress provided that the arbitration should be conducted pursuant to §§ 7 and 8 of the Railway Labor Act and that the Award should be filed in the manner

Franklin County, in early 1966. *Akron, Canton & Youngstown R. Co. v. Public Utilities Com'n. of Ohio* (Ct. of Common Pleas, Franklin Co.).

A three judge federal court heard argument on May 17, 1965, on the question of supersession of Washington's crew consist laws. *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Pearson*, Civil Action No. 6214 (W. D. Wash.)

The Supreme Court of Wisconsin has apparently ruled that the Wisconsin full crew laws are not preempted and has remanded the case for trial on other constitutional issues. *Chicago & North Western Railway Co. v. La Follette*, 135 N. W. 2d 269, 277-78 (Sup. Ct. Wis. 1965).

provided for by that Act, thereby integrating the arbitration provisions of Public Law 88-108 into the Railway Labor Act. (§ 4, R. 77)

Congress did not limit the jurisdiction of the Board in any respect and the Board, in carrying out the mandate of Congress, made its determination on a nationwide basis. The Board concluded that 90% of the firemen assignments in freight and yard operations throughout the nation could be eliminated without affecting safety of operations and without creating an undue work load on the other employees.⁸ The Brotherhoods were given the right to designate which of the positions would comprise the 10% to be retained. (Award, R. 84)

To determine train and yard crew consists throughout the country the Board made provision for a procedure whereby the crew consist of freight and yard crews was to be fixed on a local basis by Special Boards of Adjustment. (Award par. III B(1), R. 91; 41 Lab. Arb. 678) It set forth specific guidelines to be followed by these Special Boards, the first and foremost being the "Assurance of adequate safety." (Award, R. 92) Among the other factors to be considered were avoidance of unreasonable work load on the crew members, traffic density, physical characteristics of the line, availability and use of electronic communication equipment, number of highway and railroad crossings requiring protection, amount and nature of work to be performed and the length of train. (Award, R. 92-4) Many of these Special Boards concluded that freight and yard operations in the particular areas involved could be conducted with one trainman or brakeman.

⁸The Board noted that in freight service three men, the engineer, fireman and head brakeman, were present in the cab of the locomotive. (Opinion, R. 114) In yard service, the Board required installation of a dead-man control before yard locomotives could be operated without firemen. (Award, R. 84) This was in line with the recommendations of the Presidential Railroad Commission.

The entry of the federal government into the regulation of crew consists was preceded by a succession of impartial boards appointed by the federal government in an effort to resolve the conflict. Each recognized that extensive over-manning existed. Their recommendations for determination of crew consists were accepted by the Railroads but rejected by the Brotherhoods.

Thus the carriers accepted—and the Brotherhoods in turn rejected—the recommendations of the Presidential Railroad Commission issued in 1962, the recommendations of Emergency Board No. 154 issued on May 13, 1963, the recommendations of Secretary of Labor Wirtz on July 5, 1963, the proposal of President Kennedy on July 9, 1963 that all issues be submitted to Mr. Justice Goldberg as an impartial arbitrator of the dispute and the proposal by Secretary Wirtz on August 15, 1963 that the parties submit the issues to final and binding arbitration by a six-man board. (R. 103-107)

It was this impasse that prompted Congress to enter into the regulation of crew consists on railroads in interstate commerce⁴ and to make provisions for the complete and final disposition of this long standing controversy.

SUMMARY OF ARGUMENT

I. A. The state full crew laws are plainly in conflict with Public Law 88-108 and the Awards of the Arbitration

⁴An earlier impasse in Canada over minimum crew consists resulted in the appointment by the Canadian Government of tribunals to make a compulsory adjudication of the issue. See Report of the Royal Commission of Canada on the Employment of Firemen on Diesel Locomotives in Freight and Yard Service on the Canadian Pacific Railway (1957), authorizing the elimination of all such positions on diesel freight and yard locomotives. See also Report of Montpetit Board of Conciliation (1959), making a similar adjudication with respect to freight and yard locomotives on the Canadian National Railways.

Board and the Special Boards of Adjustment. The national Award decreed abolition of 90% of all firemen assignments throughout the nation and the local Awards of the Special Boards similarly determined train and yard crew consists throughout the nation. These Awards were not limited in scope but specifically applied to full crew law states. Accordingly, the fact of federal regulation of crew consists in full crew law states is indisputable.

B. Since the federal government now regulates the same subject which the full crew laws purport to regulate, such laws are superseded. The argument that the full crew laws merely complement the federal regulation flies in the face of the well established principle that a state may not prohibit conduct expressly authorized by federal law. This principle has been consistently adhered to in striking down state laws specifying higher or different standards for railroad equipment or working conditions of railroad employees than those specified by the federal government.

This Court has recognized the overriding interest of the nation as a whole in fostering federal as opposed to state regulation of labor management relations on interstate railroads. Even where there was no actual conflicting federal legislation or administrative decisions, but rather collective bargaining agreements entered into under the aegis of federal law, state laws in conflict therewith have been held to be preempted. *California v. Taylor*, 353 U. S. 553 (1957); *Railway Employees' Dept. v. Hanson*, 351 U. S. 225 (1956):

C. The state full crew laws fall within no exception to the doctrine of preemption. The regulation of the manning requirements of interstate railroads is "an inherently likely subject" for federal regulation.

Nor does the fact that the state full crew laws were ostensibly enacted in the exercise of the police power of the particular states preclude their supersession by federal regulation. The federal government, if anything, has a greater interest in the safety of interstate railway operations than does any particular state.

D. The fact that Congress provided that the Award would expire in 1966 does not signify a Congressional intent to have this nationwide problem of crew consists on interstate railroads revert to the haphazard and chaotic situation which precipitated the national emergency in the summer of 1963. While the Award itself expires in 1966, Congress envisaged that its terms would continue in effect until a change was brought about through collective bargaining between the parties under the provisions of the Railway Labor Act, and both Public Law 88-108 and the Awards envisaged a continuing determination of crew consist problems through the collective bargaining process.

II. Where, as here, the tribunals to which Congress delegated the regulation of crew consists on interstate railroads have in fact determined crew consists in full crew law states, speculation as to the subjective intent of Congress and the individual members thereof is an exercise in futility.

Even assuming such an inquiry were proper, it does not reveal an intent to abrogate the normal and foreseeable effect of the entry of the federal government into an area of interstate commerce heretofore left to the states. If there is anything which is clear from the legislative history it is that Congress was repeatedly advised that Congressional entry into the field might supersede full crew laws, absent an express disclaimer to the contrary.

There is no question that under the terms of the Awards a conflict with the full crew laws and consequent preemption did occur. Various predictions as to the effect of the possible awards, made by members of the executive branch, members of Congress and the various parties, establish nothing more than the conceded fact that Congress was aware of the problem and did nothing in the legislation which it enacted to prevent the Boards from acting in full crew law states.

ARGUMENT

I. THE FEDERAL REGULATION OF CREW CONSISTS ON RAILROADS OPERATING IN INTERSTATE COMMERCE CONFLICTS WITH AND THEREFORE SUPERSEDES STATE REGULATION OF THE SAME SUBJECT

The archaic manning requirements of the state crew consist laws typically fix an arbitrary and inflexible minimum crew in all operations throughout the state, consisting of an engineer, fireman and two and sometimes three brakemen, with no reference to local operating conditions. In addition, these laws generally require six men whenever the train exceeds a certain number of cars—twenty-four in Washington and Arkansas, twenty-five in New York and sixty-nine in Indiana—irrespective of the fact that there might be no work whatsoever to be performed enroute.

The directives of the national Award are in direct conflict with the state full crew laws. Its provision that 90% of *all* firemen assignments in freight and yard service were to be eliminated was, by its terms, unlimited. No implication that it was to be restricted to states not having full crew laws may be drawn. Indeed, the applicability of this provision to full crew law states was explicitly pointed out by the Board.

Under Section II, Part B of the Award, the Brotherhoods were given the right to "veto" the remaining 10% of the firemen assignments. (R. 83-4) The Brotherhoods took the position in many instances that exercising this veto was "improper or illegal" in full crew law states. When the Board reconvened on May 17, 1964, pursuant to Section 4 of Public Law 88-108 and Section 7(c) of the Railway Labor Act, for the purpose of clarifying and interpreting its Award, it rejected the Brotherhoods' contention, stating:

"The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called 'full crew law states' as in all other states."⁸

The extent of the conflict between the state and federal regulation of minimum crew consists cannot be fully realized without considering the local Awards of the Special Boards.

There have been a multitude of local Awards on railroad properties running through states having crew consist laws. These Awards explicitly authorize operations with fewer trainmen and brakemen than are mandated by the crew consist laws of the particular state. For instance, in addition to the decisions of the Special Boards in Arkansas (R. 176-185, 186-194, and 194-202), the Special Board ruling on crew consists on the New York and Eastern Districts of the New York Central Railroad found that approximately 300 yard and freight operations within the state of New York could be performed safely and

⁸Supplement to Arbitration Award No. 282, May 17, 1964, p. 5, filed in the United States District Court for the District of Columbia. *In re Certain Carriers*, Dkt. Misc. No. 41-63.

efficiently with a crew of an engineer, conductor and only one brakeman.⁶

This local Award, coupled with the national Award, established in New York three man crews consisting of an engineer, conductor and one brakeman. The New York full crew laws require five or six man minimum crews for the same operations. Similar local Awards ruling that three man crews are adequate for safe and efficient operations have been made on various railroad properties in other full crew law states.⁷

The approach of the National Board and Special Boards to determine crew consists in light of modern railroading conditions and the work load of the crews is in diametric opposition to the rigid, doctrinaire concept inherent in state crew consist laws that firemen are required on *all* operations irrespective of dieselization and a minimum of two or three trainmen on *all* operations irrespective of automated yards, electronic train control and other improvements. This basic difference in approach makes the conflict between the federal and state regulation deep and inevitable.

Assuming the validity of the state full crew laws, an analysis of the varied crew consists on a freight train running between two of the nation's largest cities, Chicago and New York, illustrates the extent of the disruption

⁶Award of Special Board of Adjustment in The Matter of the Crew Consist Dispute Between New York Central System, New York and Eastern Districts (except Boston and Albany Division), and Brotherhood of Railroad Trainmen, January 6, 1965.

⁷Award of Special Board of Adjustment in The Matter of Crew Consist Dispute Between New York Central System, Southern District, and Brotherhood of Railroad Trainmen, December 29, 1964 (Indiana and Ohio); Award of Special Board of Adjustment in The Matter of Crew Consist Dispute Between New York Central System, Northern District, and Brotherhood of Railroad Trainmen, October 23, 1964 (Indiana and Ohio); Award of Special Board of Adjustment in The Matter of the Crew Consist Dispute Between Chicago & Northwestern Railway, C&NW District, and Brotherhood of Railroad Trainmen, August 31, 1964 (Wisconsin).

caused by the dual federal and state regulation of crew consists.

The crew consist upon leaving Chicago, governed solely by federal law, is an engineer, conductor and two brakemen. At the Indiana border the full crew law of Indiana requires that a fireman and, if the train has more than 69 cars, a third brakeman board the train. The third brakeman rides the train until it reaches Ohio at which point, since he is not required by the Ohio full crew law, he gets off, but the fireman, who is required by that law, stays on to the Pennsylvania border. In Pennsylvania the crew consist is governed solely by federal law, and the fireman leaves the crew at that point. The train then crosses Pennsylvania with the same size crew it had when it left Chicago. Upon entering New York, the crew consist is governed by that state's full crew laws which require a fireman and, if the train has more than 25 cars, a third brakeman.⁸

A. The Fact of Federal Regulation of Crew Consists in States Having Full Crew Laws Is Indisputable

The national Award and local Awards determined the appropriate size of engine and train crew consists in states having full crew laws. As revealed above, the Board explicitly made its directive abolishing 90% of firemen as-

⁸The bizarre situations created by the patchwork of state full crew laws were also noted in the Report of Investigation by the Public Service Commission of New York on the Full Crew Laws (1960), recommending the repeal of those laws (Report, p. 36):

"One railroad witness made specific mention of a freight run of about 120 miles between Corning, New York, and Newbury Junction, Pennsylvania, on which the railroad, solely by reason of the New York full crew laws, had to assign a third brakeman for only a sixteen-mile portion of the run from Corning, New York, to the Pennsylvania state line, consuming about 45 minutes, the train continuing on for over 100 miles with only two brakemen."

signments applicable to full crew law states. The Special Boards to which the Board delegated the issue of train crew consists also acted in full crew law states and set manning standards different from those imposed by such state laws.⁹

The Brotherhoods were, of course, acutely aware of the conflict between the state full crew laws and the awards. Indeed, they advanced the argument before the Special Boards that the irreconcilable conflict between the state and federal regulation precluded such Boards from ruling on crew consists in full crew law states. Thus, in the opinion rendered in connection with the Award of the Special Board on the Northern District of The New York Central Railroad, the Brotherhoods' position and the Board's reasons for rejecting it are summarized as follows (Opinion of the Neutral Member, p. 9):

"Since some of the assignments in dispute operate in states with full-crew laws, argues the Organization, those assignments are beyond the jurisdiction of the Board; and the Organization refers specifically to New York, Ohio and Indiana in that context. The Carrier, on the other hand, in addition to arguing that some of the assignments alluded to by the Organization do not operate in Ohio, contends that the existence of full-crew laws in these states in no way infringes on the jurisdictional authority of the Board.

⁹The delegation by the Board of the train crew consist issue to the various Special Boards has been upheld. *Brotherhood of Loc. Fire & Eng. v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D. C. 1964), *aff'd* 331 F. 2d 1020 (D. C. Cir. 1964), *cert. den.* 377 U. S. 918 (1964). These local Awards are an integral part of the national Award and have "become merged in Award 282." *Brotherhood of Railroad Trainmen v. Missouri Pac. R. Co.*, 230 F. Supp. 197, 202 (E. D. Mo. 1964); *Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & P. R. Co.*, 237 F. Supp. 404 (D. D. C. 1964), *aff'd and remanded*, 345 F. 2d 985 (D. C. Cir. 1965).

"This Board must rule on the crew consist issue in the light of the dictates set forth in Award 282. And, there is nothing in Award 282 which withholds jurisdictional authority from this Board in those instances where state full-crew laws are in effect. True enough, a finding by this Board in conflict with a state full-crew law creates a problem which the parties must resolve themselves or through litigation in the appropriate legal forum, since the resolution of the conflict is beyond the Board's jurisdiction. But such conflict, while obviously a very important matter, in no way deprives the Board of jurisdictional authority."

The Special Board adjudicating the crew consist disputes on the Boston and Albany Division of The New York Central Railroad also rejected the Brotherhoods' claim that the conflict between the federal and state regulation precluded the Board from acting in full crew law states (Opinion of the Chairman, p. 8):

"The members of Arbitration Board No. 282 were undoubtedly aware that several states had laws and regulations affecting crew consists and if the Board intended to preclude a Special Adjustment Board from acting where such laws and regulations were in existence and might conflict with the decisions of the Special Board, such a restraint would have been expressed. The absence of any reference to such state laws and regulations in the Guidelines established by Board 282, seems to suggest that a Special Adjustment Board should not be inhibited in the exercise of its responsibilities by the presence of such laws and regulations, and that conflicts which occur must be resolved through the initiative

of one or both of the parties before the Award may be executed."

In spite of the conflicts created by the Boards' acting in full crew law states, the Brotherhoods did not challenge before the Board its jurisdiction or that of the Special Boards to make such determinations in full crew law states. The Board's holding in its Supplement to the Award on May 17, 1964, that the provisions of the Award dealing with firemen assignments applied in full crew law states (*supra*, p. 9) was issued in response to a query not by the Brotherhoods but by the Railroads. In light of this holding, the decision of the Brotherhoods not to ask the Board to prevent the Special Boards from acting in full crew law states is thoroughly understandable.¹⁰

Furthermore, the Brotherhoods sought no court review of the Board's determination of crew consists in full crew law states. The proper exercise by the Board of its jurisdiction is subject to the same review as is provided for decisions of boards of arbitration adjudicating disputes under the Railway Labor Act.¹¹ *Brotherhood of Loc. Fire. & Eng. v. Chicago, B. & Q. R. Co.*, *supra*, p. 12. Its jurisdiction has in fact been challenged by the Brotherhoods with respect to other issues.¹²

¹⁰At least one Special Board, in holding that it was proper to determine crew consists in full crew law states, relied upon the Board's holding that the terms of the Award pertaining to firemen applied in such states. Opinion of the Chairman of Special Board of Adjustment in The Matter of Crew Consist Dispute between The New York Central Railroad, Southern District, and Brotherhood of Railroad Trainmen, p. 7, December 29, 1964. The Brotherhoods actually applied for an injunction in the District Court to enjoin this Special Board from issuing an Award determining crew consists in full crew law states, but withdrew the motion. *Id.* pp. 4-5.

¹¹Section 4 (R. 77) made any awards issued by the Board subject to the impeachment procedures and jurisdictional challenges contained in Section 9 of the Railway Labor Act, 45 U. S. C. § 159.

¹²*Brotherhood of Railroad Trainmen v. Missouri Pac. R. Co.*, *supra*, p. 12; *Brotherhood of Railroad Trainmen v. Chicago M., St. P. & P. R. Co.*, *supra*, p. 12.

To summarize, it is indisputable that the Boards have used the power delegated to them by Congress to regulate crew consists in states having crew consist laws. Since this fact is indisputable, appellants' claim that there is no conflict and no supersession stands or falls on the proposition that state regulation in an area of interstate commerce can coexist with federal regulation of the same subject as long as it complements the federal regulation. It is to this argument that we next turn.

B. A State May Not Require Greater Crew Consists in Interstate Railroad Operations Than Those Explicitly Authorized By the Federal Government

Federal legislation supersedes state laws in conflict with it if such state laws deny rights granted by Congress or stand as an obstacle to the full effectiveness of federal law. *Mine Workers v. Arkansas Flooring Co.*, 351 U. S. 62 (1956); *Hill v. Florida*, 325 U. S. 538 (1945); *Hines v. Davidowitz*, 312 U. S. 52 (1941); *McDermott v. Wisconsin*, 228 U. S. 115 (1913).

The argument that state full crew laws are not superseded because federal regulation does not prohibit the assignment of additional crew members as required by such state laws is untenable. Where federal law authorizes, even though it does not require, particular conduct, a state statute prohibiting such conduct is superseded and must give way. *Teamsters Union v. Oliver*, 358 U. S. 283 (1959); *Franklin Nat. Bank v. New York*, 347 U. S. 373 (1954).

This principle has been applied time and time again in striking down state regulation of interstate railroad operations in areas where Congress has acted even though state regulation did not directly contradict federal regulation.¹⁸

¹⁸*Missouri Pacific v. Porter*, 273 U. S. 341, 346 (1927) (state regulation of contents of bills of lading on interstate shipments), "They [state laws] cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose

Cases applying this principle in other areas are legion. See *Hill v. Florida*, *supra*; *Pennsylvania v. Nelson*, 350 U. S. 497 (1956).

The argument advanced by appellants here, namely that the failure of Congress to explicitly prohibit state regulation not directly in opposition to the federal legislation prevents supersession of state regulation on the same subject, was also made and rejected in those cases. This argument was rejected in the strongest terms in *California v. Taylor*, 353 U. S. 553 (1957), where this Court held that the provisions of a state's civil service law could in no way govern the working conditions of employees of a state owned railroad who were within the coverage of the Railway Labor Act.

This principle of refusing to allow continued state regulation in an area where Congress has acted has also been applied in cases holding that provisions of collective bargaining agreements specifically authorized by federal law, although mere contracts between private parties, have the "imprimatur of the federal law" and, in *Railway Employees' Dept. v. Hanson*, 351 U. S. 225 (1956), were held to supersede state laws regulating the same activity.

As stated in *Teamsters Union v. Oliver*, 358 U. S. 283, 296-7 (1959), where this Court held that a collective bar-

the intention of Congress to enter a field of regulation that is within its jurisdiction"; *Napier v. Atlantic Coast Line*, 272 U. S. 605 (1926) (partial regulation of safety equipment on locomotives supersedes state legislation on same subject); *Southern Ry. Co. v. R. R. Comm., Indiana*, 236 U. S. 439 (1915) (state regulation of minimum equipment standards for freight cars preempted by the Safety Appliance Act); *Erie R. R. Co. v. New York*, 233 U. S. 671 (1914) (state law regulating maximum hours to be worked by railroad telegraphers preempted by Federal Hours of Service Act); *New York Central R. R. Co. v. Winfield*, 244 U. S. 147 (1917) (Workmen's Compensation Act of New York preempted by Federal Employers' Liability Act).

gaining agreement made pursuant to the National Labor Relations Act preempted a state's antitrust statute:

"... Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress."

Where state regulation of employees of interstate railroads has been attempted, this Court has recognized that the interest of the nation as a whole in the railroad industry is an additional and vital reason for holding the federal law to be paramount. Thus, in reaching the conclusion in *California v. Taylor*, that under the Railway Labor Act "the terms of the collective-bargaining agreement that they [the state employees] have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service law" (353 U. S., at 561), this Court noted that the "principal unions in the railroad industry are national in scope" and concluded that (353 U. S., at 567):

"It is by no means unreasonable to assume that Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force."

C. The State Laws in Issue Do Not Fall Within Any Exception to the General Rule of Supersession

Appellants rely principally upon *Florida Lime & Avocado Growers v. Paul*, 373 U. S. 132 (1963), as support for their contention that where state legislation imposes more stringent requirements than federal legislation, state action is not superseded by the exercise of federal power in the field. (Appls. Br. No. 69, pp. 31-2)

In that case this Court held that a state statute designed to prevent the deception of consumers by prohibiting the sale of avocados with less than 8% oil content was not preempted by a federal marketing regulation, approved by the Secretary of Agriculture, governing the quality and maturity of Florida avocados by criteria other than oil content. The majority opinion distinguished the "decisions which have invalidated direct state interference with the activities of interstate carriers" (373 U. S., at 141) and concluded that the "maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation. Certainly it is not a subject by its very nature admitting only of national supervision..." (373 U. S., at 143)

Unlike the "maturity of avocados," the regulation of the size of train crews operating in interstate commerce, once exercised on a national scale, should be applied uniformly and indiscriminately throughout the nation to promote the nation's transportation policy and "to eliminate inequities." *California v. Taylor*, *supra*, p. 16; *Cloverleaf Co. v. Patterson*, 315 U. S. 148 (1942).

Of course the states are not powerless to prevent anarchy within their borders and protect their citizens against personal injury or property damage threatened by violence or breach of peace. *Allen-Bradley Local v. Board*, 315 U. S. 740 (1942); *Garner v. Teamsters Union*, 346

U. S. 485, 488 (1953). However, the individual interests of the various states in regulating interstate crew consists is not paramount to that of the federal government.

Appellants' argument that the police power of the states overrides the normal preemptive effect of the federal regulation is in essence an assertion that the interest of a particular state in manning levels entitles it to impose a higher cost of operations upon interstate carriers than the federal government has determined to be necessary for safety of operations. This cost is enormous—over \$13,000,000 annually in New York alone.¹⁴ These heavy, additional operating costs in a key interstate industry in and of themselves are strong arguments favoring national uniformity.

Chicago, R. I. & Pac. Ry. Co. v. Arkansas, 219 U. S. 453 (1911), and *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249 (1931), which held that the Arkansas full crew laws were not preempted by federal law, are not controlling here. If anything, they sustain the position of appellees because the explicit basis for the Court's decision in each case was the failure of Congress at that time to legislate or establish any regulations pertaining to crew consists.¹⁵

If the full crew laws are permitted to stand and be enforced, so that the assignments found to be unnecessary and safely dispensable by the Awards are nevertheless required to be filled, not only would nationwide uniformity of

¹⁴*New York Central Railroad Co. v. Lefkowitz*, 46 Misc. 2d 68, 94, 259 N. Y. S. 2d 76, 103 (Sup. Ct. Westchester Co. 1965).

¹⁵In the *Norwood* case, this Court phrased the question to be determined as follows (283 U. S., at 256):

"Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?"

In the instant case this is precisely what Congress authorized the Board to determine.

application of the Awards be precluded, but the policy established by Public Law 88-108—a national solution to a nationwide problem—would be nullified.

Finally, appellants argue that the emergency which prompted Congress to enter into the regulation of crew consists in interstate commerce could have been settled by the parties to the dispute without affecting the continued viability of state full crew laws, and the ensuing federal regulation of interstate crew consists must therefore give way to all state regulations of the same subject. This argument assumes that the states can continue to regulate in the field of railroad labor relations even though a solution has been arrived at through a collective bargaining agreement between the parties as provided for under the Railway Labor Act. As revealed in Point II of appellees' Brief, this assumption is incorrect.

Furthermore, the argument is a *non sequitur*. Even assuming, *arguendo*, that the Brotherhoods might have had the benefit of the continued effectiveness of state full crew laws had they reached a voluntary settlement with the Railroads, this would in no way have precluded Congress from establishing a nationwide solution to a nationwide problem. The scope of an agreement which the private parties could have reached could not curtail the power of Congress. As revealed above, the federal government not only has the power but has actually regulated crew consists in full crew states. Accordingly, the state regulations must give way.

D. State Crew Consist Laws Will Not Be Reinstated Upon Termination of the Award

The fact that the Award will expire by its terms in 1966 cannot be construed to mean that Congress intended only temporarily to preempt the field. That such was not the in-

tention of Congress is apparent from the fact that Congress anticipated that the solution evolving from the Award would be augmented thereafter by collective bargaining between the parties pursuant to the Railway Labor Act. (§ 4, R. 77)

The District Court rejected the contention that the action by Congress was only of a temporary nature, stating "... we cannot believe that the Congress intended to allow a return of the confusion and chaos that impelled it to act ..." (239 F. Supp., at 29; R. 278)

In establishing a procedure to resolve this issue Congress obviously intended that crew consists would be fixed for a two year period by the Awards and that any subsequent changes would be governed by collective bargaining conducted pursuant to the Railway Labor Act. Such collective bargaining agreements would supersede any state legislation regulating the same subject matter. *California v. Taylor*, *supra*, p. 16; *Teamsters Union v. Oliver*, *supra*, p. 15.

Here Congress has acted to make a "complete", "final" and "binding" disposition of the crew consist issues on a national scale. (§ 3, R. 77) In its opinion the Board expressed the expectation that the parties would pursue collective bargaining¹⁰ so that the problem "will not again make it necessary for the Government to do for the parties what the parties should do for themselves". (R. 97)

If Congress intended that the parties would be free, upon the termination date of the Award in 1966, to disregard the Awards the parties would then be free to take

¹⁰In furtherance of this objective the Board inserted a provision in the Award (Part E—Continuing Study) directing the parties to

"... establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect." (R. 89)

whatever action they deemed appropriate. This would permit the Railroads to eliminate all firemen assignments, as well as all trainmen assignments on freight train and yard crews that they deemed unnecessary, in flagrant disregard of the job protection provisions of the awards. Employees who had been terminated and who had received substantial sums as severance pay would be free to demand reemployment. It is inconceivable that Congress intended such a result.

The safe and efficient operation of railroads is a matter of the utmost national importance. By the enactment of Public Law 88-108 Congress dealt with certain aspects of the problem on a nationwide basis. The attempt by Congress to develop a nationwide solution to a national problem should not now be frustrated by the vagaries in the application of different, outmoded, conflicting and inconsistent standards developed by state governments.

II. THE LEGISLATIVE HISTORY DOES NOT ESTABLISH A CONGRESSIONAL INTENT THAT THE STATE FULL CREW LAWS CONTINUE IN EFFECT

Since the conflict between the federal regulation on the one hand and the full crew laws on the other is patent and irreconcilable, there is no occasion to consider whether the legislative history establishes a subjective intent of Congress to preempt. *Ex Parte Collett*, 337 U. S. 55 (1949); *Packard Co. v. Labor Board*, 330 U. S. 485, 492 (1947).

Assuming inquiry into legislative history were proper, it does not appear that any legislative intent to continue the full crew laws in effect can be established. On the contrary, the legislative history discloses that although Congress was repeatedly advised that Public Law 88-108 might

preempt state full crew laws absent an express disclaimer, no such disclaimer was enacted. Congress therefore presumably intended the normal rules of preemption to apply. Under the normal rules, the absence of a provision allowing continued state regulation in the same area in which Congress acted requires a finding of preemption.¹⁷

That the bill submitted by President Kennedy did not give recognition to the full crew laws was early brought to the attention of the House Committee. When this question was raised, Secretary Wirtz advised the Chairman of the Committee that the bill did not contain a provision authorizing continued state regulation of crew consist. House Hearings, pp. 111-113.

Similarly, the General Counsel of the Interstate Commerce Commission advised the Committees of both houses of this problem and pointed out to the Committees that if Congress intended to avoid supersession of state full crew laws a simple phrase to that effect should be included in the legislation. House Hearings, p. 614; Senate Hearings, pp. 400-401.

Despite these statements Public Law 88-108 contained no such exclusionary language. It is reasonable to conclude that Congress' failure to include such a disclaimer, after this issue had been raised, was not inadvertent. It evidences, we submit, an intent to permit the doctrine of preemption to operate in the normal fashion.

¹⁷See *Southern Ry. Co. v. R. R. Comm., Indiana*, 236 U. S. 439 (1915). In *California v. Taylor*, 353 U. S. 553 (1957), this Court was emphatic in holding that the absence of an express disclaimer indicated a Congressional intent not to restrict the coverage of the federal statute there involved, stating (pp. 564-5):

"We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees."

The argument that Congress responded to these comments by eliminating all references to the Interstate Commerce Act from the legislation, and thereby inferentially indicating its intention to avoid supersession of state action, is pure conjecture. Indeed, this contention is flatly belied by the report of the Senate committee responsible for the revision.¹⁸ As that report reveals the Interstate Commerce Commission was not given the task of regulating crew consists because organized labor, including the Brotherhoods, had expressed concern regarding the Commission's competency and impartiality and the possibility of a compulsory arbitration precedent for the entire transportation industry. The facts are that the question of preemption was directly before Congress; that Congress was advised that supersession of state laws could be avoided by including a saving clause to that effect, if such were the intention of Congress; and that no such disclaimer was adopted by Congress.

In these circumstances, neither the expression by the House Committee that it "does not intend" that any award shall supersede state full crew laws nor the views expressed by Congressman Harris to that effect can be taken to express the intent of Congress that its action was intended to be applied only in those states which did not have full crew laws. Indeed, the views of Congressman Harris were immediately challenged by Congressman Smith. 109 *Cong. Record* 15273 (August 28, 1963).

The ambiguous testimony of the parties appearing before the House and Senate Committees certainly indicates no understanding on the part of the parties as to the effect of the legislation on state full crew laws. A representative of the carriers testified that on the basis of his "understanding" as to "our hearing what Secretary Wirtz testified

¹⁸S. Rep. No. 459, 88th Cong., 1st Sess. (1963), pp. 8-9.

to yesterday, it would not preempt any State full crew laws." House Hearings, p. 562. On the other hand, representatives of the Brotherhoods testified that "the Commission would have jurisdiction over States' minimum crew bills" (Senate Hearings, p. 478) and that "perhaps the Interstate Commerce Commission could in some way supersede the State full crew laws that were now in effect." (House Hearings, p. 837). If this testimony demonstrates an "understanding" by the parties on the question of preemption it is, at most, an understanding that they were in total disagreement.¹⁹

Thus, the legislative history, if relevant at all, suggests that Congress did, in fact, intend to preempt the field.

¹⁹The Supplemental Rebuttal Statement for the Carriers submitted to the Senate Committee (applts. Br. No. 69, p. 24) simply reflects the fact that adoption by Congress of the proposed Resolution would not permit the *immediate* elimination of excess crew members in full crew law states and that the carriers would be required to comply with the provisions of the laws in effect in those states until such laws were repealed or invalidated by judicial action.

CONCLUSION

For each of the reasons heretofore assigned, it is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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November, 1965

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

Nos. 69 and 71

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, *Appellants*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, *Appellees*.

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, *Appellants*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE NATIONAL RAILWAY LABOR
CONFERENCE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Railway Labor Conference, the *amicus curiae* on whose behalf this brief is submitted, represents the great majority of American railroads. Its function is

to assist these member railroads in connection with labor relations problems and represent them in contract negotiations that are national in scope. When Public Law 88-108 (77 Stat. 132, 45 U.S.C. following § 157) was enacted, Conference members accounted for 92 percent of the total railroad mileage in the United States, employed 94 percent of the industry's employees, and owned 95 percent of the total net investment in railroad plant and equipment in this country.¹ Corresponding percentages today are somewhat greater. (A list of the member railroads appears in Appendix I hereto.)

The members of the Conference include nearly all of the carriers that are subject to Public Law 88-108 and the Award by Arbitration Board No. 282 rendered pursuant thereto. Through its Chairman, who has served as a carrier member of both the Presidential Railroad Commission and the Arbitration Board, the Conference has been the carriers' principal spokesman throughout the dispute that culminated in the Award by Arbitration Board No. 282.

The interest of the Conference in this case is two-fold. In the first place, since many of its members operate in states that have minimum crew laws² and since other states—and, indeed, municipalities—may at any time decide to enact such legislation, the Conference has an obvious and important stake in this Court's decision whether such laws are valid. This interest is particularly immediate for

¹ 109 Cong. Rec. 15275; Hearings before the Senate Committee on Commerce on S.J.Res. 102, 88th Cong., 1st Sess., p. 106 (hereinafter referred to as Senate Hearings); Hearings before the House Committee on Interstate and Foreign Commerce on H.J.Res. 565, 88th Cong., 1st Sess., p. 200 (hereinafter referred to as House Hearings).

² In their brief, the labor organization appellants refer to these state laws as "full crew laws." (BLE Br. p. 8, n. 1.) Railroads frequently refer to the same laws (for good reason) as "excess crew laws." However, in this brief the less argumentative term "minimum crew laws" will be used.

the carrier members that are parties to pending suits involving minimum crew laws of several states other than Arkansas,³ states which have themselves filed briefs *amicus curiae* in the case at bar. The minimum crew laws now on the books in seven states⁴ require the carriers to maintain many jobs that Arbitration Board No. 282 has determined do not serve either the public interest in "adequate and safe transportation services" or any legitimate interest of the

³ *Switchmen's Union v. Erie L.R. Co.*, Sup. Ct. Erie Cty., N.Y. (1965) (New York law held preempted by P.L. 88-108), *appeal pending*, Appellate Division; *New York Central R. Co. v. Lefkowitz*, 46 Misc.2d 68, 250 N.Y.S.2d 76 (Sup. Ct. Westchester Cty. N.Y. 1965) (New York law held not preempted), *appeal pending*, Appellate Division; *New York Central R. Co. v. Public Soc. Comm'n*, Super. Ct. Marion Cty., Ind. (1965) (enforcement of Indiana law enjoined), *appeal pending*, Indiana Supreme Court; *Chicago & N.W. R. Co. v. LaFollette*, 135 N.W.2d 269, 277-278 (Wisc. 1965) (Wisconsin law held not preempted; now pending in lower state courts on remand); *Chicago M. St. P. & Pac. R. Co. v. Pearson*, No. 6214 (E.D.Wash.) (Washington law; pending); *Akron, C. & Y. R. Co. v. Public U. Comm'n*, Ct. Com. Pleas, Franklin Cty., Ohio (Ohio law; pending). Also, the Texas minimum crew laws have recently been held to be preempted in a decision that is now final. *Texas v. Southern Pac. Co.*, 302 S.W.2d 497 (Tex. Civ. App. 1965) (alternative holding), *writ of error refused* "no reversible error," Texas Supreme Court.

⁴ General minimum crew laws currently are extant in seven states—Arkansas, Indiana, Massachusetts, New York, Ohio, Washington, and Wisconsin: Ark. Stat. Ann. §§ 73-720 through 722, 73-726 through 729 (1957); Ind. Stats. §§ 55-1327 through 1334 (1951); Mass. Ann. Laws c. 100, § 135 (1959); N.Y. Railroad Law §§ 54-a through 54-e (1952); Ohio Rev. Code §§ 4999.06-.07 (1954); Wash. Rev. Code §§ 81.40.010-.030; Wisc. Stats. §§ 192.25-.26 (1957). Laws in Nevada and Texas have been held to be applicable only to steam-powered operations: *Southern Pac. Co. v. Dickerson*, 397 P.2d 187 (Nev. 1964) (Nev. Rev. Stats. § 705.390 (1963); *Texas v. Southern Pac. Co.*, *supra* (Tex. Civ. Stats. Art. 6380 (1926)) (alternative holding). Minimum crew laws have been repealed entirely in Mississippi: Miss. Code §§ 7759-61 (1964 Supp.). The portions of minimum crew laws that apply to freight and switching operations have been repealed in Arizona, California, Nebraska, North Dakota, and Oregon: Ariz. Rev. Stat. § 40-853 (1965 Supp.); Cal. Labor Code §§ 6900.1-6903 (Dec. 1964 Supp.); 1965 CCH Adv. Sess. Laws Reprtr. (Nebraska) 715; N.D. Code §§ 49-13-09 through 49-13-13 (1965 Supp.); Ore. Sess. Laws c. 462, § 1 (1965 Supp.). Maine has a law that applies only to steam-powered passenger trains. Me. Rev. Stat. Ann. § 35-1161.

carriers' employees. Thus the substantial burden imposed on the members of the Conference by these laws hampers the carriers' efforts to realize fully the goal of the National Transportation Policy—"safe, adequate, economical, and efficient service and . . . sound economic conditions among the several carriers." (54 Stat. 899, 49 U.S.C. preceding §1.)

In addition, the carriers represented by the Conference, wherever they operate and whatever this Court's decision as to the validity of state minimum crew legislation, may be directly affected by any statements that the Court may make concerning the work rules that will govern the manning of trains upon expiration of the two-year period during which the Arbitration Award "shall continue in force." (P.L. 88-108, §4.) Certain arguments advanced by appellants appear to be based upon the erroneous premise that when the Award "expires" the work rules in effect prior to the Award will be revived, thereby requiring the carriers to hire thousands of men to fill positions eliminated under the Award. But, as we shall show, the work rules prescribed in the Award will continue to regulate the manning of trains after expiration of the two-year period until those rules are changed after collective bargaining conducted pursuant to Section 6 of the Railway Labor Act.

We have had the opportunity to examine carefully the brief of appellees and we agree with the arguments presented therein. We shall not repeat in detail the arguments so effectively advanced by appellees, although we think it worthwhile to supplement appellees' statement of the case in certain respects and to underscore certain elements of appellees' analysis that we consider particularly important. We do, however, treat more fully the question of the significance to be given the duration of the Award in states not having minimum crew laws. Although that ques-

tion is a collateral matter in this case and hence naturally not central to the arguments of the parties, the manner in which the Court treats the issue may be of paramount importance to the members of the *amicus* entirely apart from the outcome of this particular litigation.

STATEMENT

The basic issue in this case is the correctness of the lower court's decision that two Arkansas minimum crew laws are invalid under the Supremacy Clause of the Constitution because they are superseded by Public Law 88-108 and the Award of Arbitration Board No. 282 thereunder. If the Congress and the Board acted upon a subject matter that is also the subject matter of the minimum crew laws, and if this federal action resulted in manning regulations in conflict with the minimum crew laws, those laws cannot stand.

While we believe that the character of the Congressional mandate to the Arbitration Board and the inconsistency of the Board's Award with the state laws is clearly disclosed by the terms of the statute and the Award, at the same time we cannot agree that "it seems pointless to supplement the countless reviews of the history of the dispute" (BLE Br. p. 14 n. 7). The statute and the Award did not represent a novel solution conceived by the members of the 88th Congress and the Board. Rather, the legislation and the Award bear the imprint of years of troubled negotiation by the parties and of thoughtful examination by distinguished public bodies. In consequence, the sketchy statements of fact supplied by the appellants simply will not serve. Rather, it is the statement set forth in the appellees' brief that brings into clear focus the purpose of the Congress in enacting Public Law 88-108. We believe it may be useful to the Court for us to add certain additional facts

with which the *amicus* is especially familiar because of its role as railroad negotiator.

The 1959 and 1960 notices that, in a formal manner, marked the beginning of the dispute that led to the enactment of Public Law 88-108 represented the culmination of years of controversy respecting the reduction of manpower made possible by modern technology. When the notices were served, the use of firemen was required on most diesel engines by rules stemming from the National Diesel Agreement of 1937 between many carriers and the BLF&E. Thus, engines were ordinarily manned by an engineer and a fireman, and in addition, in the case of road freight trains, by a head brakeman. However, the 1937 agreement had been signed at a time when few of the carriers involved had had much experience with the use of diesels—only 218 of 43,812 locomotives then in use were diesels—much less with such later devices as “deadman controls,” which halt the engine in the event of the disability of the engineer. Report of the Presidential Railroad Commission (1962), pp. 36, 38 (hereinafter cited “PRC Report”).

It soon became evident that, at least in road freight trains where there were three men in the cab and where the fireman no longer was occupied by stoking the boiler, it did not make much sense to have three men to perform the tasks that previously the head brakeman had shared with the engineer. And while on yard engines engaged in switching operations there were generally only two men in the cab, the carriers were of the view that the engineer alone could safely operate the engine because operations were conducted at low speed and were controlled by hand signals from men on the ground.

The situation as to the “consist” of train crews—i.e., the members of the crew other than the engineer and the

fireman—was somewhat different. When the 1959 and 1960 notices were served, the consist of train crews—putting aside minimum crew law states—was governed by a variety of local agreements, and sometimes was left entirely to managerial discretion. Many crews consisted of one conductor and two trainmen. But many others included fewer than two trainmen, while some crews included more. The carriers were convinced that here, too, in many circumstances existing agreements required more men than necessary to insure safe operation, especially in view of such developments as the introduction of Centralized Traffic Control, the increasingly widespread use of radio-telephone, improvements in braking and signal systems, and the modernization of classification yards.

The railroads' judgment has been vindicated by every public body that examined this problem in the context of the 1959 and 1960 notices. Apart from the Arbitration Board itself, the most important of these public bodies was the Presidential Railroad Commission appointed by the President in 1960 (Exec. Order 10891). That Commission, which was composed of a distinguished group headed by Judge Simon H. Rifkind, conducted an extensive hearing that produced a mass of evidence,⁵ the bulk of it relating to the contentions of the brotherhoods respecting safety and workload. In its Report to the President, dated February 26, 1962, it stated that "an elaborate system of rules, practices, and decisions, developed over a period of more than 100 years, governs the manning of American railroad engines and trains [and] the assignment of railroad operating employees to their daily tasks" (p. 2). This "common law" of railroad labor relations, the Commission concluded, had

⁵ The Commission heard 79 witnesses during 96 days of hearings, during which it compiled a transcript of 15,306 pages, received statements from an additional 155 witnesses, and accepted exhibits introduced by the parties aggregating another 20,319 pages. PRC Report, p. 16.

"not been sufficiently flexible to permit many changes in manning and assignments which are appropriate in the light of the technological and economic revolutions that have taken place" (p. 6). Consequently, it recommended generally that "the rules governing the manning of engines and trains and the assignment of employees be revised to permit the elimination of unnecessary jobs and at the same time to safeguard the interests of the individual employees adversely affected" (p. 7).

The "basic considerations" which governed the Commission in making specific recommendations were "that the Nation is entitled to a safe and efficient rail-transport system, that management should be accorded reasonable opportunity to install technological improvements, that employees are entitled to work . . . under conditions which promote efficiency, safety, and security, and that where improvements in technology leading to greater productivity adversely affect employees, adequate provision must be made for their welfare" (p. 9). In this connection, the Commission observed that "an efficient, safe, and modern railroad system in muscular trim for effective competition, will provide better employment opportunity than a system headed toward decline by its own obsolescence" (p. 11).

In this context, the Commission made recommendations as to the specific issues before it. With respect to the use of firemen, it observed that the basic dispute concerned the essentiality of the fireman's job "for the safe and efficient operation of diesels in road freight and yard operations" (p. 37). Accordingly, the Commission analyzed each of the fireman's basic tasks in terms of safety and efficiency. Of these tasks, the brotherhoods relied most heavily upon the maintenance of a "lookout" on the left-hand side of the cab (including the passing of signals to the engineer). The Commission unequivocally rejected the brotherhoods' con-

tentions, stating that "the fireman's lookout function . . . is not essential to the safe and efficient operation of road freight and yard diesels" (p. 40). On freight diesels, which were invariably manned by three persons, the lookout function could be performed by the head brakeman, who had shared it with the fireman in the past (pp. 38-40). And "on yard diesels, [the fireman's] function in passing signals is minimal. In view of the slower nature of yard operations, which proceed under signals from members of the ground crew, the precautions taken by other members of the crew should suffice for the safety of men and equipment. The only exception . . . is in those rare occasions when the yard engineer is disabled while the diesel is in motion" (p. 40). And those situations could be met by requiring use of dead-man controls (pp. 43-44).⁶

The Commission concluded, in light of these findings, that although it was not possible to say "that nowhere in the United States is there in operation a single run which requires the services of a [fireman] to render it safe and efficient," such situations would be so nearly "unique" that they should not be made the subject of a general rule requiring the use of firemen (pp. 45-46). Accordingly, the Commission recommended that the existing rules requiring the use of firemen be abrogated and that, subject to measures for the protection of men already employed—retention of firemen with more than ten years' service and substantial separation allowances to others—the carriers should be permitted in their discretion to discontinue firemen's assignments (pp. 48-50).

As to the consist of train crews, the parties' contentions once again revolved about "the matter of safety of opera-

⁶ Similarly, the Commission found that mechanical duties performed by firemen "are relatively minor, and are not essential to safe operation" (p. 43), and that on road freight diesels in the event of disability of the engineer the head brakeman could "easily stop the train" (p. 43).

tions" (p. 56). The Commission determined that the existing rules, most of which had been developed more than 30 years ago and some of which went back to the 19th century (p. 55), had resulted in "some overmanning . . . but little undermanning" (p. 57). Accordingly, the Commission recommended that the carriers and the brotherhoods be allowed to propose changes in the consist of specific crews, and that if agreement could not be reached the disputes be arbitrated by special tribunals which should apply the basic criteria of "safety of operations" and appropriate workload (p. 59). The men already employed would be protected in various ways, as in the case of firemen (p. 60).

These findings and recommendations were, of course, at odds with state minimum crew legislation, as the Commission recognized. The Commission stated: "[M]ost of the legislation of this kind was enacted prior to 1920. These laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue [consist of train crews] should have nationwide application." Just "how the restriction of those laws may be lifted," however, the Commission did not undertake to answer (p. 64).

While the carriers accepted the Commission's recommendations, the brotherhoods did not. Therefore, after Mediation Board efforts failed and the brotherhoods rejected the Board's proposal that the dispute be arbitrated, the President established, pursuant to Section 10 of the Railway Labor Act, an Emergency Board consisting of Judge Samuel I. Rosenman, Clark Kerr, and Nathan P. Feinsinger (Exec. Order 11101).

The Emergency Board's recommendations, in general, were the same as those of the Presidential Railroad Commission. In its report of May 13, 1963,⁷ the Board stated

⁷ The report is set out in full in the House Hearings, pp. 42-49.

that the basic issue was whether the brotherhoods were right in contending that their proposals respecting manning were essential for the protection of employees "against arbitrary, unsafe, and unreasonably onerous working conditions, and for necessary security and stability of employment. . . ." House Hearings, p. 43. With respect to the use of firemen, the Board noted that "[t]he carriers have always accepted the continued use of firemen on passenger diesel operations, where there are now only two men in the cab," but that, as to freight diesels, the carriers maintained that the "work performed by firemen. . . —left-hand look-out, the communication of signals to the engineer, and the detection and correction of locomotive malfunctions"—"can be combined with other work performed by employees in other classifications." The brotherhoods, moreover, did "not contend that there are no jobs presently occupied by firemen which cannot be abolished." Thus, the Board observed, "The basic problem . . . becomes one of establishing a procedure for ascertaining those situations, if any, which will continue to require the presence of a fireman in order to assure adequate safety, and to prevent placing an undue burden upon the remaining crew members." House Hearings, p. 45.

The Board's recommended solution was to permit the carriers to eliminate firemen's jobs, subject to a right of protest by the brotherhoods as to certain "key" categories. If a protest could not be resolved through negotiation, it would be settled by arbitration. For persons already employed, the Board recommended protective provisions that generally paralleled those of the Presidential Commission. House Hearings, pp. 45-46.

As to crew consist, the Board's recommendation was again basically the same as that of the Commission. That is, the parties should negotiate locally, pursuant to national

guidelines "based on considerations of safety and efficiency and of undue burden on other members of the crew," and failing agreement there should be arbitration. Persons already employed could not, however, be released except by attrition. House Hearings, p. 47.

Again, the carriers accepted the Board's proposals but the brotherhoods rejected them. The President then proposed arbitration by Mr. Justice Goldberg—accepted by the carriers, rejected by the brotherhoods. The President next requested a report from a special subcommittee of the President's Advisory Committee on Labor-Management Policy. That report, dated July 19, 1963, also recognized that a fair settlement of the manning disputes involved, in essence, the finding of a solution that would serve all the interests at stake—the nation's, the carriers', and the employees'—in "safe and efficient operations," with fair treatment of employees already in service. See H.R. Rep. No. 713, 88th Cong., 1st Sess., pp. 8-10; Senate Hearings, p. 17; House Hearings, pp. 14-15.

Three days later the President asked the Congress for legislation. His message called attention to the reports of the Presidential Commission, the Emergency Board, and the subcommittee of the Committee on Labor-Management Policy, and stated that his objective was to provide a solution for the parties' dispute which, among other things, "recognizes both the public interest in promoting railroad efficiency" and "the public's concern for those adversely affected by a settlement." Senate Hearings, p. 8; House Hearings, p. 9. He proposed that an "expert body should pass on these proposed rule changes in the light of public service and safety" and should make provision for the welfare of employees who might otherwise be adversely affected. That body should be "directed to use to ad-

vantage the work of the two previous panels which received evidence on these matters"—the Commission and the Emergency Board—and should "judge the effect of each proposed rule on the adequacy and safety of transportation service to the public and on the interests of both parties." Senate Hearings, p. 9; House Hearings, p. 9. He quoted the Commission's statement that "[a]n adequate program to realize the benefits of advancing technology in the public interest . . . must include both reasonable opportunity for management to achieve change, and for workers to enjoy reasonable protection against the harsh effects of too sudden change. Progress plus protection must be our choice. . . ." Senate Hearings, p. 10; House Hearings, p. 10. And he also cited the Emergency Board's view that there is a "necessity for progress in the railroad industry, for efficiency in order to meet the challenge of competing industries," but that a solution must "at the same time . . . preserve not only strong unions for the employees, but for the individual worker a continued life of usefulness to himself and his family, and to society itself." Senate Hearings, p. 11; House Hearings, p. 10. The President concluded the message by urging the "prompt enactment" of the legislation to "help launch a new national effort to meet the growing challenge of worker displacement by technological and economic change," an effort that would "above all . . . benefit the public interest, and that is our primary test." Senate Hearings, p. 13; House Hearings, p. 12.

This dominant note sounded by the President—that the task was to serve the public interest by solving the problem of automation in a way that would permit the railroads to provide efficient and safe service and at the same time protect employees from hardship—continued as the theme of the congressional hearings. Thus the committees ex-

plored the interests that had to be taken into account—the nation's and the parties' in "progress" plus protection,"⁸ and safety of railroad operations.¹⁰

Finally, after last minute efforts by the Labor Department to settle the dispute failed, the Congress had to act in order to prevent a nationwide strike scheduled for August 29, 1963. The result was Public Law 88-108. While the statute differed from the President's bill in certain respects—*e.g.*, an *ad hoc* board replaced the Interstate Commerce Commission for reasons set forth in the appellees' brief—there was no change in the basic purpose of the legislation. Thus, the years of dispute, investigation, and recommen-

⁸ The need to eliminate assignments rendered obsolete by technological change in the railroad industry was explored in detail with witnesses for the Administration and the carriers. *E.g.*, Senate Hearings, pp. 45, 65, 79-80, 92, 109, 111, 117, 121, 124, 126, 127, 128, 137-139, 227-228, 235-237, 242-244, 244-245, 252-255, 354-356, 360, 368-369, 373-374, 411; House Hearings, pp. 37-40, 182-185, 186-190, 204-206, 212-213, 217-218, 248-249, 250-257, 261-266, 306-313, 400-401, 408-410, 417-418, 427-428, 527-529, 542, 545-547, 574. Further indications of Congress' concern with the matter appear in the Senate debate. 109 Cong. Rec. 15043, 15049, 15050, 15051, 15057, 15122-23; 15276.

⁹ The need to provide for the protection of employees already in service was also explored extensively with government and carrier witnesses. *E.g.*, Senate Hearings, pp. 45, 46, 64, 70-71, 99, 107-108, 109, 110, 123, 366, 402-403, 405-406, 408-410; House Hearings, pp. 37-38, 39-40, 51-52, 57-58, 62-63, 66-67, 70-71, 74-76, 91-92, 101, 117-167, 172-173, 186, 206-207, 214, 216, 242, 243, 258-260, 415-417, 425-427, 534-535, 550, 574-575, 576, 582-583, 585, 586, 591-592, 612. This matter, too, received attention in the committee reports and was discussed during the subsequent debates. See H.R. Rep. No. 713, 88th Cong., 1st Sess., pp. 8, 9, 23-24, 25-26; S. Rep. No. 459, 88th Cong., 1st Sess., p. 4; 109 Cong. Rec. 15966-67; see also 109 Cong. Rec. 15903, 15133.

¹⁰ The effect of any legislation on the safety of railroad operations was also the subject of much testimony during the hearings. *E.g.*, Senate Hearings, pp. 72, 85-86, 98, 99, 100, 110, 118, 121, 122, 124, 125, 482-488, 491-493, 501, 504-505, 528, 530, 536, 630-634, 709-712; House Hearings pp. 50, 107-108, 110-111, 182-185, 213, 241-242, 250-257, 265, 421, 548, 618, 647, 706-723, 738-767, 803, 805, 815-816, 820, 996-999. Congress' concern with safety was indicated also in the House Report and during the debates. H.R. Rep. No. 713, 88th Cong., 1st Sess., pp. 8, 9, 21-22, 24-25; 109 Cong. Rec. 15903, 15962, 15127, 15128, 15141-42.

dations were distilled in Section 7(a), which directed the Board, in the language of Section 3 of the President's bill, to "give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected," as well as to the narrowing of the areas of disagreement accomplished in bargaining and mediation. The Board faithfully executed this mandate, as the courts have held in rejecting petitions by the brotherhoods to impeach the validity of the Board's Award. *Brotherhood of L. F. & E. v. Chicago, B & Q. R. Co.* 225 F. Supp. 11 (D.D.C. 1964), *aff'd*, 331 F. 2d 1020 (D.C. Cir. 1964), *cert. den.*, 377 U.S. 918 (1964).¹¹

The conclusions reached by Arbitration Board No. 282 and the provisions of its Award have been fully described in appellees' brief, and need not be repeated here. We emphasize only that the Board generally agreed with the conclusions of the Presidential Commission and the Emergency Board concerning the reductions in the manning of trains made possible by technological advances without unduly affecting the safety of operations, and that the provisions of the Award generally correspond with the recommendations made by the Presidential Commission and the Emergency Board despite some differences in detail.

Thus, the Arbitration Board did, as its mandate required, give prime attention to the requirements of safety—the problem that, as we have indicated, so deeply engaged the attention of the public bodies that were the lineal ancestors of the Board. The proceedings before the Board were, in the language of its Neutral Members, "pervaded" with "concern with safety" (Op. Neut. Members, R. 116).

¹¹ The neutral members of the Board were Ralph T. Seward, Chairman, Benjamin Aaron and James J. Healy; the carrier members were J. E. Wolfe and Guy W. Knight; and the union members were H. E. Gilbert and R. H. McDonald.

It is this problem—the minimum manning requirements consonant with reasonable assurances of safety—that is also the sole purported justification for the state minimum crew laws. And the findings of the Arbitration Board respecting the minimum number of firemen that should be required as well as the findings of the special boards respecting the minimum crew consist—findings made with due regard to safety of operations—are squarely in conflict with the requirements of the state minimum crew laws enacted many years ago when conditions in the industry were very different from present-day conditions.

SUMMARY OF ARGUMENT

The fundamental problem of automation—securing the benefits of modern technology without producing wholesale dismissal of employees—is addressed in the railroad industry by Arbitration Award No. 282. The basic thrust of the Award is that employees who have devoted any substantial part of their careers to the railroads should not be required to look elsewhere for work, but that, as those employees leave, the railroads should not be required to fill positions that are no longer needed. State minimum crew laws foreclose the possibility of adjusting the manning of trains to modern technology in that eminently sensible manner. The result is unsound as a matter of policy and improper as a matter of law.

I. 1. The subject matter of the Arkansas laws and the awards rendered pursuant to Public Law 88-108 is the same: the number of men to be assigned to the crews of trains. There is no exception in either the federal statute or the awards for states that have minimum crew laws.

2. The federal awards and the Arkansas laws are in conflict, and therefore the Arkansas laws cannot stand. The federal awards authorize the elimination of 90% of fire-

men's assignments and the use of two or fewer brakemen on trains operated by appellees, while in general the Arkansas laws require the use, in Arkansas, of a fireman and three brakemen on each such train. The argument that there is no conflict because appellees can comply with the Arkansas laws without violating the federal awards assumes erroneously that the only purpose of the federal minimum manning requirements is to prevent undermanning. However, an equally important purpose, implicit in the standards provided by Section 7(a) of Public Law 88-108, is to secure the benefits that accrue from the elimination of overmanning. The Arkansas laws are an obstacle to the execution of that purpose. The argument that there is no conflict because the Congress allegedly sought only to prevent a strike likewise misreads the purpose of the federal legislation. Because the prevention of a strike necessarily would affect the underlying manning issues, Congress directed a federal board to resolve those issues in accordance with the national interest. The purpose disclosed by that direction is frustrated by the continued application of the Arkansas laws.

3. The legislative history of Public Law 88-108 does not support the contention that the Congress intended an exception for minimum crew law states. In view of the importance of such an exemption and its inconsistency with the overall purposes of the federal legislation, such an exemption should not be implied in the absence of a clear demonstration that it was intended by the Congress as a whole. Such a demonstration is not provided by the comment in the report of the House Committee on Interstate and Foreign Commerce, amplified during the floor debate by the Chairman of that Committee, to the effect that the measure would not affect state manning laws. First, the Chairman of the Commerce Committee was imme-

diately challenged by the Chairman of the Rules Committee, whose Committee had also considered the bill and its effect on state manning laws; thus, it cannot be said that the House as a whole agreed with one view or the other. Second, there is no reference to any exception for minimum crew law states in the Senate report and debate, and the Senate acted in the face of authoritative advice that if Congress desired to avoid supersession it should amend the bill so to provide; thus it cannot be said that the "intent" of the Senate was not to preempt. Third, to the extent they differed, the bill eventually enacted was the bill adopted by the Senate rather than the House Committee's version. Accordingly, the most persuasive evidence of the Congressional intent is what the Congress actually *did*; and what it did cannot be reconciled with the continued vitality of state minimum crew laws.

4. The appellants' reliance on a supposed "safety" justification for the Arkansas statutes is unsound. The suggestion that the Court should not presume that the Congress meant to override state "safety" legislation is inappropriate in an instance like this, in which the Congress deals with the very subject matter of the state legislation, takes safety into account, and reaches a determination inconsistent with the state legislation. Moreover, it is now impossible to establish that the Arkansas laws are reasonably related to the requirements of safety, cf. *Southern Pacific v. Arizona*, 325 U.S. 761, 775-780 (1945), in view of the federal determination that safety does not justify the manning levels required by the Arkansas laws.

Equally unsound is the complex suggestion that the Arbitration Award should be viewed as a collective bargaining contract entered into pursuant to the Railway Labor Act, and, accordingly, that the validity of the Arkansas laws is established by a supposed "safety" exception to the

general rule that a collective bargaining agreement concerning a matter as to which federal law imposes a duty to bargain overrides inconsistent state laws. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *California v. Taylor*, 353 U.S. 553 (1957). Apart from the fact that it is no longer possible to establish a safety justification for the Arkansas laws, the Award is *not* simply a collective bargaining agreement; it represents the considered judgment of a tribunal created by the Congress upon the very subject matter with which the Arkansas laws purportedly are concerned. Moreover, even if the Award is viewed as a railway labor collective bargaining contract, it nevertheless preempts the Arkansas laws. The preemptive effect of the Award must be tested under the Railway Labor Act and Public Law 88-108 *in combination*. The manning dispute which led to the enactment of Public Law 88-108 was one of the most difficult *economic* disputes in the history of labor-management relations. The Preamble to Public Law 88-108, and the President's Message to which Public Law 88-108 was the Congress' response, emphatically express the preference of the Congress and the Executive for solutions to the manning dispute "reached through collective bargaining." Indeed, the various statutory limitations on the scope of the arbitration, on which the appellants rely so heavily, are expressions of that emphatic preference. Accordingly, neither *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931), which was decided under the Railway Labor Act alone, nor the reference to state safety legislation in *Teamsters Union v. Oliver*, *supra*, is controlling here. Rather, the controlling precedent is the *holding* in *Oliver* that "the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress," 358 U.S., at 296-297.

II. The Award, as such, is in force for only two years. Thereafter, the work rules established by the Award will continue to govern the manning of trains until those rules are changed through collective bargaining in the manner prescribed by the Railway Labor Act. However, arguments advanced by the appellants imply the contrary—that when the Award expires, the pre-Award rules will revive. The importance of this issue goes far beyond any issues as to preemption, for the manning rules in effect after the expiration of the two-year period will affect all carriers subject to the Award wherever they operate.

1. The Congress expected the Board to authorize the elimination of substantial numbers of unneeded positions and to provide generous separation allowances and long-term wage guarantees for employees adversely affected. Such provisions—which were included in the Award—are wholly inconsistent with automatic revival of earlier rules. The Congress did not intend that the railroads should pay millions of dollars in separation allowances in order to eliminate positions declared to be unneeded, only to be required after a few months to hire enough men to fill the very same positions.

Rather, as stated in Section 3 of Public Law 88-108, the Congress intended that the Award should be a “complete and final disposition” of the issues that it determined, and thus a point of departure for collective bargaining in the future. To be sure, when Congress integrated the arbitration into the Railway Labor Act, it provided—in the language of Section 8(j) of the Railway Labor Act as to the duration of arbitration awards—that the award should continue “in force” for only two years. But under the Railway Labor Act, the termination of an arbitration award does not terminate the parties’ obligation to comply with the rules that the award established; by reason of the

"major disputes" provisions of the Act, those rules remain in effect until they are changed in the manner prescribed by the Act. The effect of a termination provision is simply to free the parties to resume collective bargaining.

2. The principles just stated will govern the situation following expiration of the Award in states that do not have minimum crew laws. They also refute appellants' contentions that preemption could not have been intended because of the supposedly "temporary" nature of the federal legislation, and that, if intended, preemption ceases at the end of the two-year period. The Congress intended a "complete and final disposition" of the original dispute and the establishment of new rules reflecting contemporary conditions, rules which would serve the justified interests of the parties and the public and which would remain in effect until changed through normal collective bargaining. Those rules, both as established by the Arbitration Award and as eventually modified through collective bargaining, must be effectuated in minimum crew law states as well as elsewhere if the Congressional intent is to be fully achieved.

ARGUMENT

At the heart of the legal issues raised in this case is a public policy question of large consequence: whether the effectiveness of a Congressionally sanctioned resolution of labor problems produced by automation can be limited by inconsistent state laws. The railroads and their employees share with other American industries both the anxieties and the hopes generated by modern labor-saving technology. In the case of the railroad industry, the need for securing the benefits of that technology is particularly urgent; if it is to continue to perform effectively its role as a principal mover of the nation's goods it must strengthen its

competitive position *vis a vis* other modes of transportation. And whatever may be the complete catalog of causes for the inroads that have been made by the railroads' competitors, there can be no dispute that excessive railroad labor costs have been a major factor. In recent years vigorous management, together with radical innovations not related to labor costs, such as "piggyback" service, have measurably improved the position of the railroads. But if the burden of excessive labor costs cannot be lifted, the railroads will be unable to afford a service that reflects fully the inherent advantages of railroad transportation, and the public will suffer.

At the same time, the public interest, as well as the interest of the railroads, embraces considerations other than dollars, and therein lies the dilemma. If the railroads were immediately to take full advantage of available technological changes, wholesale dismissal of employees would result.

As we have indicated, the quest for a reasonable resolution of these competing considerations has troubled railway labor negotiations since the advent of the diesel locomotive in the 1930's, and the tensions have become ever more aggravated as the pace of technological change has accelerated. The Arbitration Award of Board 282, rendered against the backdrop of the recommendations of the public bodies that explored the problem prior to the passage of Public Law 88-108, has given the first genuine promise of a breakthrough.

The fundamental thrust of the Award, as of the recommendations of the Presidential Commission and the Emergency Board, is quite simple and, in the railroads' view, eminently generous to the employees.¹² It is that the em-

¹² The railroads do not stand alone in holding this view. The court which upheld the Award, for example, commented that the Board "de-

employees who have devoted any substantial part of their working lives to the railroads—over two years in the case of firemen and any time at all in the case of other crew members—should not be required to look elsewhere for employment, but on the other hand that the railroads should not, once those employees have left, be required to hire new employees to fill needless positions. While under this scheme the railroads will be required to shoulder a very large cost that, strictly from an economic point of view, is wasteful, the railroads are not insensible of their obligations toward the employees who have served them long and faithfully, as is evidenced by the railroads' willingness to accept the job protection provisions—as well as all other provisions—of the recommendations of both the Presidential Commission and the Emergency Board. The promise held out to the railroads is that, having undertaken that burden for an interim period, ultimately they will be free to take full advantage of existing technology.

While it is regrettable that the parties could not take the first step in solving the automation problem without government intervention, it is the first step that is the hardest. The railroads are hopeful that the work rules prescribed by the Award will establish a base upon which, after the expiration of the Award, collective bargaining can be expected to build in effecting whatever adjustments may be desirable from time to time. And, as we show below, this was also the expectation of the Congress. The Congress intended that, after the expiration of the Award, the work rules prescribed therein should continue to govern the manning of trains until changed pursuant to normal collective bargaining under Section 6 of the Railway Labor Act.

played extreme consideration and even benevolence for the future of employees in regular service." *Brotherhood of L. P. & E. v. Chicago B. & Q. R. Co.*, *supra*, 225 F. Supp., at 18.

But in seven states, minimum crew laws foreclose the possibility of resolving, in the manner intended by the Congress, the problem of adjusting the manning of crews so as to afford the railroads and the public the substantial benefits of technological advances while insuring both the safety of operation and the welfare of employees. That is so even though, in view of the findings of Board 282, of the special boards established under its Award, of the Presidential Commission and of the Emergency Board, there can no longer be any genuine doubt that these state laws, however reasonable when passed, are now superannuated. Indeed, no appellant on brief has raised a voice in defense of the soundness of state minimum crew laws.

The question, then, as a matter of labor relations policy, is whether these archaic laws should bar the full realization of the promise of Public Law 88-108, thereby hampering the railroads in their efforts to provide the best possible service and casting upon the people of all of the states the attendant costs. In the first part of this argument, we urge that such a result, which is so plainly undesirable as a matter of common sense, is also insupportable as a matter of law.

We devote the last part of our argument to the question whether, upon the termination of the two-year period of the Award, the work rules prescribed by the Award are to remain in effect until changed pursuant to Section 6 of the Railway Labor Act or, instead, the old work rules are to be automatically reinstated. The resolution of this issue will affect operations in all states and will shortly be of critical importance. Since some of appellants' arguments erroneously imply that the old work rules will be reinstated, we think the Court should be fully advised of the character of the problem and of the reasons why the work rules pre-

scribed by the Award continue in effect after the expiration of the two-year period until changed in the manner provided by the Railway Labor Act.¹²

I. State Minimum Crew Laws Have Been Superseded by Federal Regulation.

The appellees have assembled the precedent relevant to the preemption issue and have analyzed the issue in detail. While we agree with appellees' argument and shall not attempt to cover fully all of the relevant considerations, we perhaps may assist the Court by a statement of our views concerning some of the more significant aspects of the case. The dispositive questions appear to be: Did the Congress in Public Law 88-108 take action with respect to a subject matter that is covered by the Arkansas statutes, and, if so, is the federal action inconsistent with the state laws? We submit that those questions should be answered in the affirmative and, consequently, that the Arkansas minimum crew laws cannot stand.

1. *The Congress took action with respect to a subject matter covered by the Arkansas statutes.* In Section 3 of Public Law 88-108, the Congress directed the Arbitration Board to make a "complete and final disposition of the . . . issues" covered by the parties' 1959 and 1960 notices. Those "issues," as they had been put to the Presidential Commission, the Emergency Board, and the Congress, cen-

¹² We support the appellees in their claim that the Arkansas laws, which in effect exempt all intrastate carriers from the burdens they impose, discriminate unconstitutionally against interstate carriers. As that issue turns upon the particular provisions of the Arkansas laws and thus is not of direct concern to the members of the *amicus* who do not operate in Arkansas, we do not discuss it further in this brief. We do note, however, that the presence of this constitutional issue renders inapplicable this Court's recent decision in *Swift & Co. v. Wickham*, — U.S. — (No. 2, 1965 Term). See *Florida Lime & Avocado Growers, Inc. v. Jacobson*, 382 U.S. 73 (1966).

tered upon determining the number of crew members that are required by a variety of considerations and authorizing the carriers to eliminate all unnecessary positions, provided that safety of operations was secured and existing employees were treated fairly. Thus the Congress responded to the President's request for action that would "help launch a new national effort to meet the growing challenge of worker displacement by technological and economic change. . . ." See *supra*, p. 13.

Not only is the subject matter of the federal statute—the number of employees to be used on trains—the same as that of the Arkansas statutes, but the federal statute on its face is to have nationwide application. No exception is made for minimum crew law states, nor is there such an exception in the Award of Board 282 or in the awards of the special boards that have dealt with crew consist in minimum crew law states under authority of Board 282's award. This is hardly surprising, for the automation problem was presented to the Presidential Commission, the Emergency Board, the Congress, and Board 282 as a national problem—as of course it is.

2. *The action taken pursuant to Public Law 88-108 is inconsistent with the state statutes.* It seems obvious that the federal arbitration awards rendered pursuant to Public Law 88-108 are inconsistent with the Arkansas statutes. The Award by Board 282 authorizes the elimination of 90% of firemen's positions, and the awards of the special boards respecting crew consist authorize the use of two or fewer brakemen, on appellees' trains. In sharp contrast, with certain minor exceptions the Arkansas laws require the use, in Arkansas, of a fireman and three brakemen on each such train.

The argument to the contrary most vigorously pressed is that the carriers can comply with both the state laws

and the federal awards by obeying the former. But this misconceives the purpose of the federal legislation. Appellants' contention might be valid if the Congress' purpose had been confined to the establishment of minimum manning requirements in order to protect the employees and the public from the consequences of undermanning. But that was only part of the task the Congress set for the Board. The Board was equally charged with protecting the public and the carriers from the consequences of *overmanning*. Its job was to determine what crew sizes are adequate to satisfy all relevant considerations, *so that the carriers might eliminate unneeded jobs*. The purpose was to achieve "progress plus protection," in the words of the Presidential Commission cited by the President—not protection alone. The continued application of the Arkansas laws will frustrate that important purpose of the federal law, a purpose that is implicit in the Section 7(a) standards—"adequate and safe transportation service to the public and . . . the interests of the carrier and employees affected"—and that is evident from the entire history of the dispute that led to the enactment of Public Law 88-108. In short, what the Board has authorized pursuant to federal law, the Arkansas laws prohibit.

The appellants also suggest that the Congress' sole purpose was to prevent a strike, and that, since enforcement of the state laws would not frustrate that purpose, the laws are not superseded. But it is clear that the Congress' purpose was not limited to preventing a strike. To be sure, it was that purpose that led the Congress to act. But it could not prevent the threatened work stoppage—which, it may be noted, would not have been limited to states not having minimum crew legislation¹⁴—without affecting the underlying dispute as to manning of trains. A simple strike

¹⁴ See S. Rep. No. 459, 88th Cong., 1st Sess., p. 5.

prohibition would have determined the manning issues entirely in the carriers' favor. Conversely, prohibiting changes in the existing work rules, which also would have prevented a strike, would have determined the underlying dispute entirely in the unions' favor, leaving the carriers burdened with countless positions that two neutral federal tribunals had recommended be eliminated. Thus, to prevent a strike, the Congress had no reasonable choice but to regulate the working conditions in dispute, either directly, as it had in 1916 by requiring an eight-hour day,¹⁸ or through an appropriate federal agency. It chose the latter, and directed the agency to decide the manning issues in accord with the requirements of the national interest expressed in the Section 7(a) standards. The purpose disclosed by that direction is no less real, and is quite as important, as the purpose of preventing a work stoppage. Because "the application of state law . . . would operate to frustrate" that "purpose of the federal legislation," the state laws "must give way." *Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964). The state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added).

3. *The contentions of appellants based upon the legislative history of Public Law 88-108 are unsound.* In answer to the analysis outlined above, the appellants assert that the legislative history of Public Law 88-108 evidences that the Congress did not intend preemption. The appellees are, we submit, on sound ground in maintaining that, since what the Congress *did* is incompatible with the continued vitality of the state laws, what some members of the Congress may have *said* at one time or another is immaterial. And what

¹⁸ 30 Stat. 721; see *Wilson v. New*, 243 U.S. 332 (1917).

the Congress did, as is shown above, cannot be reconciled with the continued vitality of state minimum crew laws.

But even if resort to legislative history is appropriate, appellants are not aided. An exemption of minimum crew law states from the scope of the legislation should not be implied in the absence of the clearest possible demonstration that it was intended by the Congress as a whole, in view of the importance of such an exemption and its inconsistency with the overall purposes of the legislation. Cf., *California v. Taylor*, 353 U.S. 553, 561-567 (1957). The only substantial support for appellants' argument is a comment in the report of the House Committee on Interstate and Foreign Commerce (H.R. Rep. No. 713, 88th Cong., 1st Sess., p. 14), as amplified by the Chairman of that Committee during the floor debates (109 Cong. Rec. 15273), to the effect that the measure before the House would not supersede state minimum crew legislation. That comment is not sufficient to carry appellants' burden for several reasons.

In the first place, when the Chairman of the House Committee on Interstate and Foreign Commerce expressed on the floor of the House the view of his Committee that state minimum crew laws would not be superseded, he was immediately challenged by the Chairman of the House Rules Committee, who also supported the bill and whose Committee had also considered the bill and its effect upon state minimum crew legislation. (109 Cong. Rec. 15271, 15273.) Even apart from the other legislative history cited by appellees, therefore, it cannot be said with any certainty from what was said in the House of Representatives that the House as a whole agreed with the views of the one Committee and its Chairman or with the views of the other Committee and its Chairman.¹⁶

¹⁶ See *Chicago, Etc. R. Co. v. Acme Freight*, 336 U.S. 465, 475 (1949), where this Court gave "little weight" to a committee report "not previously

Secondly, the report by the Senate Committee on Commerce (S. Rep. No. 459, 88th Cong., 1st Sess.) did not contain any remarks similar to those in the House Report, and no one suggested during the debates in the Senate that the legislation would not be effective in states having minimum crew laws. Rather, the Senate Report and the Senate debates, like the legislation itself, assume that a nationwide problem was involved and thus do not expressly deal with the possibility of an exception for states having minimum crew laws.¹⁷ The Senate acted, moreover, in the face of advice by the General Counsel of the Interstate Commerce Commission, in the Senate Hearings (pp. 400-401), that if the Congress wished to be certain that state minimum crew laws would not be affected, the bill should be amended so to provide.¹⁸ Even if it could be said that the House of Representatives did not intend state minimum crew laws to be superseded, therefore, there is no basis whatsoever in the legislative history for believing that the Senate shared that intent, and good reason for believing that it did not.

Thirdly, to the extent that there were inconsistencies between them, the bill eventually enacted was that adopted by the Senate rather than that reported by the House Committee on Interstate and Foreign Commerce. The House amended H.J. Res. 665 to conform to S.J. Res. 102, and then passed the Senate measure (109 Cong. Rec. 15271, 15288, 15295-96).

submitted to members of the committee and expressly contradicted without challenge on the floor of the House by a ranking member of the committee. . . ."

¹⁷ E.g., S. Rep. No. 459, 88th Cong., 1st Sess., pp. 4-6; 109 Cong. Rec. 15048-15049, 15050, 15051.

¹⁸ The bill under consideration at the time was the Administration bill providing for determination of the manning issues by the I.C.C. However, the decision of the Congress to employ instead an arbitration board was, as appellees have demonstrated (Br. pp. 53-54), unrelated to the preemption issue.

In view of these considerations and those discussed in appellees' brief, we believe that the court below was correct in observing that "if any rational conclusion can be drawn from a legislative history on the question . . . it is that the Congress intentionally elected not to include a saving provision for such [state minimum crew] laws and thereby create local exceptions to the authority of the arbitration board to fix the size of train crews on a nationally uniform basis" (R. 266). At the least, it cannot be said that the legislative history evidences a clear intent on the part of the Congress to except minimum crew law states from the scope of Public Law 88-108. The most persuasive evidence of the Congressional intent remains what the Congress did. On that basis, as we have said, there can be no doubt: What the Congress did in Public Law 88-108 undercuts the Arkansas and other minimum crew laws and, therefore, by virtue of the Supremacy Clause, such laws are dead.

4. Appellants' arguments based upon the purported safety justification for the minimum crew laws are unsound. Appellants' arguments based upon the proposition that the minimum crew laws are safety measures are not very clear, but they appear to make two separate points—both of which are without substance.

The first point appears to be that the Court should presume that the Congress did not intend to override state safety legislation. That argument ignores the fact that the Congress in enacting Public Law 88-108 was specifically concerned with the relation of the manning of trains to safety of operation, and that the Arbitration Board was mandated to and did give large weight to that factor. Whatever may be the situation with respect to state safety legislation in general, when the Congress has dealt with the very subject of that legislation and has reached a de-

termination inconsistent with that legislation, the "presumption" should be that the Congress intended to preempt the state legislation. No one has suggested that the federal government lacks the power to regulate the manning of trains in interstate commerce; when it does so, as here, inconsistent state legislation, whether grounded on "safety" considerations or something else, must fall. Cf., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 227-228, 229-236 (1947); *New York Central R. Co. v. Winfield*, 244 U.S. 147 (1917); *Southern R. Co. v. Railroad Comm'n*, 236 U.S. 439, 446-448 (1915); *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919); *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926); *Northern Pac. R. Co. v. Washington*, 222 U.S. 370, 375-380 (1912).

Moreover, this as well as appellants' other argument based upon an alleged safety justification for the Arkansas minimum crew laws is undermined by the impossibility of establishing that the minimum crew levels specified by those laws are reasonably related to the requirements of safety. Cf., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-780 (1945). It is doubtful whether those minimum crew levels ever were justified by safety considerations. But whatever may have been the situation when the Arkansas laws were enacted over a half century ago, they cannot now be so justified. At the specific direction of the Congress, the Arbitration Board and the special boards created under its Award extensively considered the minimum crew levels consonant with reasonable safety of operations and determined, as had the Presidential Commission and the Emergency Board, that under present-day conditions safety of operations will be adequately insured by crews substantially smaller than those required by the Arkansas laws. Whatever might be the situation in the absence of such federal determinations, Arkansas cannot be permitted to justify its mini-

imum crew requirements by a contrary evaluation of the requirements of safety today or by reliance upon an evaluation that, even if warranted when made, has now been demonstrated by impartial federal agencies to be insupportable under contemporary conditions.

The second point that appellants appear to draw from their premise that the minimum crew laws are safety measures is more complicated than the one just discussed, but equally erroneous. In effect, appellants contend that the Congress intended the Arbitration Board to fashion an agreement for the parties to the manning dispute, and thus that the Award should be regarded as the equivalent of a collective bargaining agreement. Appellants must, of course, acknowledge that *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), and *California v. Taylor*, 353 U.S. 553 (1957), hold that state laws may be preempted by collective bargaining agreements entered into pursuant to federal labor legislation; but they argue that the minimum crew laws, as safety measures, come within an exception supposedly recognized in the *Oliver* opinion for "a case of a collective bargaining agreement in conflict with a local health or safety regulation . . .," 358 U.S., at 297.¹⁹

¹⁹ We note that *Oliver* did not hold that "a local health or safety regulation" could not or would not be preempted by a collective bargaining agreement authorized by federal law, but merely recognized that such a regulation was not there involved. *Terminal Ass'n v. Trainmen*, 318 U.S. 1, 6-7 (1943), indicates that the Railway Labor Act, and bargaining thereunder, did not occupy the field to the exclusion of state laws regulating "sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection" and similar subjects. But as we show in the text, the number of men assigned to train crews is one of the most critical economic issues in railway labor negotiations, unlike the subjects described in *Terminal Ass'n*.

Thus, appellees are on sound ground in maintaining (Br. pp. 32-37) that state minimum crew laws seek "specifically to adjust relationships in the world of commerce," *Teamsters Union v. Oliver*, *supra*, 358 U.S., at 297, and accordingly are to be distinguished from ordinary health and safety regulations for purposes of the holding in the *Oliver* case. In this

In addition to the impossibility, referred to above, of establishing that the minimum crew laws in fact are reasonably related to the requirements of safety, the short answer to this contention is that the Arbitration Award is more than a "collective bargaining agreement," even though it prescribed work rules which modified and became a part of existing collective bargaining agreements (see p. 46, *infra*); the Award represents the considered judgment of an arbitration board created by the Congress and dominated by impartial neutral members upon the very subject with which the minimum crew laws purport to be concerned.

There is, in addition, a more fundamental answer to appellants' contention. We agree with appellees that, putting aside Public Law 83-108 and viewing the Award simply as the equivalent of a collective bargaining agreement arrived at pursuant to the Railway Labor Act, it would preempt the Arkansas statutes. Surely *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931), has been undermined by the subsequent development of the preemption doctrine in the labor relations area and is in addition dis-

connection, how two of the appellants in this case—the BRT and the BLE—regard state minimum crew laws was evidenced by recent announcements in their publications that they had agreed with carriers in certain states to withdraw from all litigation as to the legality of the minimum crew laws in the states in which those carriers operate and also to withdraw their opposition to repeal of such laws. In exchange, the carriers agreed to provide job security for firemen and trainmen now in service (and in the case of the BRT agreement to maintain crew consists at certain prescribed levels that are below the levels required by the Arkansas statutes and by the laws of some of the states in question). See "Trainmen News," February 8, 1965, p. 1 ("BRT Does It Again! Crew Consist Pact Safeguarding Jobs Won on 24 Roads"); "The Locomotive Engineer," January 15, 1965, pp. 1, 2 (the BLE "has won full protection for every fireman-helper on the rosters of the Eastern Railroads even if the state full-crew laws now protecting those jobs are repealed"). In an editorial announcing the BRT agreement (which agreement appears in Appendix IV hereto), the President of the BRT stated: "This agreement places the matter of the crew consist—long a matter of bitter dispute—where it belongs: in collective bargaining agreements." "Trainmen News," February 8, 1965, p. 1.

tinguishable on other grounds set forth in appellees' brief. But *Norwood* can be disregarded, even if still valid in the context in which it was decided, because the preemptive effect of the Award must be tested under the Railway Labor Act and Public Law 88-108 *in combination*. Whatever may be said about the intent of the Congress with respect to prior agreements as to manning arrived at under the Railway Labor Act alone, Public Law 88-108 introduces a wholly new element which cannot properly be ignored, even if it be assumed that the Award thereunder is the equivalent of a collective bargaining contract.

The history of the dispute set forth in our Statement and in the appellees' brief demonstrates that the parties to the dispute, the Presidential Commission, the Emergency Board, the President and the Congress all recognized that the work rules governing the manning of trains were the subject of perhaps the most vexing and difficult railway labor relations controversy in 'decades, that resolution of the dispute would have important *economic* consequences to both the railroads and to their employees, that the contentions of both sides centered upon the reasonable requirements of safety, and that the interest of the nation as a whole required the Congress, as the President put it, to "help launch a new national effort to meet the growing challenge of worker displacement by technological and economic change." See p. 13, *supra*.

This "new national effort" was to consist of solutions arrived at through collective bargaining, insofar as that method was consistent with the public interest. Thus, the Presidential Commission stated "that the solutions to the issues before us must be found within the framework of collective bargaining," noting that in other industries it "is generally considered to be a function of management to determine the size and composition of the work force," but in the railroad industry "the employees have a legiti-

mate collective bargaining interest in the matter of crew consist, and it is our view that the collective bargaining process should remain the basic method for resolving disputes concerning this matter." PRC Report, pp. 7, 55, 58. The President, in his Message to the Congress, repeated this theme, stating that his objective was to propose action that "[e]ncourages the parties to achieve their own solutions through collective bargaining," and that legislation which would provide only for interim changes in work rules "for those situations and for such length of time as the parties are unable to agree by collective bargaining" was desirable so as to "preserve and prefer collective bargaining and give precedence to its solutions." Indeed, while the legislation he proposed would have covered all issues between the parties, it was, he said, "most appropriate to the disposition of those rule changes involving the manning of train and engine crews—the automation issues" Senate Hearings, pp. 8, 10; House Hearings, pp. 9, 10 (emphasis added).²⁰

Public Law 88-108 reflected this approach. The preamble to the Joint Resolution, for example, recited that it was desirable to resolve the dispute over manning "in a manner which preserves and prefers solutions reached through collective bargaining," even though the breakdown of that process required federal intervention. As stated in the Senate Report, the Joint Resolution was "designed to insure a prompt, peaceful, and fair settlement of the 4-year-old railroad work rules dispute by collective bargaining where possible and by arbitration where bargaining has not succeeded." S. Rep. No. 459, 88th Cong.,

²⁰ See also, *e.g.*, Senate Hearings, pp. 39, 40, 44, 57, 69-70, 72, 375, 430-432, 451-459, 474, 475, 481, 483, 490-491, 499-500, 516-517, 563, 607, 622-623, 655-656, 665; House Hearings, pp. 32, 33, 37, 39, 81, 501, 621, 652, 672, 735, 770, 771-772, 810, 829, 910, 987-988, 1000; 109 Cong. Rec. 15048, 15049, 15281, 15282, 15283, 15286, 15287, 15290.

1st Sess., p. 3. Consequently, the scope and effect of the arbitration were limited in various ways, the most important of which restricted the duration of the Arbitration Award to not more than two years, after which the work rules prescribed in the Award are subject to bargaining under Section 6 of the Railway Labor Act, although they continue in effect while such bargaining is in process.²¹

In these circumstances, neither *Norwood* nor the so-called "safety" exception to this Court's holding in *Oliver* are controlling, even if the Award is deemed to be the equivalent of a collective bargaining agreement. Rather, the truly relevant precedent is the holding in *Oliver*. The emphatically expressed preference of the Congress and the Executive for solutions to the manning dispute reached through collective bargaining will as surely be frustrated in minimum crew law states, if those laws are not preempted, as will be the solution imposed by arbitration pending such collectively bargained solutions. If ever there was a situation which justified application of the holding

²¹ We discuss the limitation upon the duration of the Award and its significance in detail at pp. 38-53, *infra*. Among other things, we demonstrate that the limitation upon the duration of the Award does not, as appellants argue, indicate that preemption was not intended or that the Arkansas laws will revive upon expiration of the two-year period, even if preempted during that period. To the extent that appellants rely also upon the other limitations upon the scope and effect of the Award—the restriction of arbitration to matters as to which the parties were not in agreement and to carriers who were parties to the 1959 and 1960 notices, and the freedom of the parties to supersede the Award by voluntary agreements during the life of the Award—to support their argument that preemption was not intended, those limitations also merely reflected the preference of the Congress for solutions reached in collective bargaining. Thus, the reason for the limitations is inconsistent with an intent not to preempt state minimum crew laws, as such laws, of course, frustrate solutions reached in collective bargaining as well as those imposed by arbitration. Moreover, the fact that the Congress expressly placed some limitations upon the scope and effectiveness of arbitration under Public Law 88-108 indicates that further unexpressed limitations, such as an exception for states having minimum crew laws, were not intended, rather than that they were, as appellants appear to argue.

in *Oliver* that "the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress," 358 U.S., at 296-297, surely this is such a situation. The Congress has taken the question of manning in hand because of its recognized importance to the national interest, has expressed its preference for a solution of the question through collective bargaining, and has sanctioned an interim solution by arbitration to be used as a point of departure in any future negotiations, all of which is squarely inconsistent with the continued enforcement of state minimum crew laws. Even if the Award be viewed as analogous to a collective bargaining contract, therefore, the Award and the collective bargaining agreements that may be made in its wake should be held to override conflicting state legislation.

II. The Rules Established by the Award Will Continue to Govern the Manning of Trains, After the Expiration of the Two-year Period During Which the Award Is In Force, Until Those Rules Are Changed in the Manner Prescribed by the Railway Labor Act.

Pursuant to Section 4 of Public Law 88-108, the Arbitration Award provides that it "shall continue in force" for two years from its effective date unless the parties agree otherwise (R. 95). That two-year period will end on January 25, 1966, except with respect to firemen, as to whom it will end on March 31, 1966, by agreement of the interested parties. Appellants urge that this limitation upon the duration of the Award demonstrates both that preemption of state minimum crew laws was not intended by the Congress and that, if intended, preemption ceases upon the termination of the two-year period of the Award with a consequent revivification of the state minimum crew laws.

The appellants, in their briefs, do not spell out their un-

derstanding of the situation that will exist with respect to the work rules governing the employment and use of firemen and trainmen upon expiration of the two-year period during which the Award "shall continue in force." Their arguments based upon the expiration of the Award appear to assume, however, that the Congress intended a restoration of the *status quo* existing before the dispute which culminated in the enactment of Public Law 88-108, and, consequently, that the work rules in effect for years prior to the Award will be revived.

We show below that, to the contrary, the work rules established by the Award will continue to govern the manning of trains after the expiration of the two-year period during which the Award is in force *as an award*, until those rules are changed in the manner prescribed by the "major disputes" provisions of the Railway Labor Act. The Congress did not intend a return to the preexisting *status quo* under work rules which have long been regarded by almost everyone to be obsolete and which led to the frustration of normal collective bargaining, but rather intended that the work rules established by the Award should constitute a new and more realistic *status quo* which would provide a basis for normal collective bargaining in the future.

Before discussing this matter in detail, we emphasize that its importance goes far beyond any issues as to the preemption of state minimum crew laws. The work rules governing the manning of trains after the expiration of the two-year period of the Award affect all carriers subject to the Award wherever they operate and whatever may be the ultimate fate of state minimum crew laws. Thus, the BLF&E has informed the carriers that in its view the work rules in existence prior to the Award—the rules that were repudiated by the Award—will go back into effect upon termination of the two-year period, and that, in consequence, firemen again must be used on virtually all trains although

they serve no necessary function. In mid-November 1965, the BLF&E served the carriers with a notice, purportedly pursuant to Section 6 of the Railway Labor Act, in which it proposed a new agreement as to the use of firemen to be effective following expiration of the Award. The letter transmitting the notice stated, however, that the position of the BLF&E is that the pre-Award rules will automatically be operative upon expiration of the Award, if the carriers do not in the meantime agree to the organization's demand for a new contract.²²

1. *The rules established by the Award will govern the manning of trains until changed through collective bargaining.* In assessing the validity of the position thus taken by the BLF&E, it is worthwhile to note the practical consequences of that position. As of July 1965, some 17,000 firemen's assignments had been eliminated pursuant to the Award, approximately half of them through promotion or by natural attrition.²³ In addition, as of September 1965, the railroads had paid over \$36 million in separation allowances to firemen who had rejected comparable job offers and elected instead to be separated from service and to other firemen whose services were subject to termination under the Award.²⁴ Thus, the BLF&E is claiming: (1) that

²² See Notice No. 1 in Appendix II hereto. After setting forth the demand for a new contract to be effective on March 31, 1966, the notice continues: "This proposal is made to you, notwithstanding the fact that upon the expiration of the Award of Arbitration Board 282, the collectively bargained agreement with respect to employment of firemen (helpers) will be in full force and effect. We shall expect that on and after 12:01 a.m., March 31, 1966, you will comply fully with the collectively bargained agreement with respect to employment of firemen (helpers) on this property, unless another agreement has been reached in the meantime."

²³ Hearings before the Senate Committee on Commerce on the Administration of Public Law 88-108, 89th Cong., 1st Sess. (Aug. 2-Sept. 28, 1965), Tr. pp. 1095, 1270 (hereinafter referred to as "1965 Senate Hearings").

²⁴ 1965 Senate Hearings, Tr. pp. 1297, 1451-1452.

when the two-year period during which the Award is "in force" ends, everything that has happened since 1959 in connection with the manning disputes will be entirely undone, leaving the parties where they began six years ago; (2) that as of 12:01 a.m. on March 31, 1966, the railroads must find enough men to hire to fill over 17,000 firemen's assignments eliminated pursuant to the Award; and (3) that the expenditure by the railroads of many millions of dollars in separation allowances brought them in return, not the elimination of unneeded assignments, but only the right to operate certain trains without firemen for a relatively few months.

The Congress intended nothing of the sort. Rather, it provided for an Award the provisions of which it knew would be utterly inconsistent with the automatic restoration of some earlier *status quo* at the end of two years. It realized fully from the reports of the Presidential Railroad Commission and the Emergency Board that any Award likely would result in the elimination of several thousand unneeded assignments²⁵—just how many thousand assignments should be eliminated is what the dispute really was all about.²⁶ Moreover, the Congress expected the Board to include in its Award protections for present employees which, to be adequate, would have to extend beyond two years. The Presidential Railroad Commission and the Emergency Board had both recommended substantial separation and relocation allowances and long-term guarantees against reductions in wages. Similar recommendations had

²⁵ E.g., "It is impossible for those who represent the brotherhoods to go back to their members with any great fruits of victory, because it is inevitable that jobs that are rendered needless and unnecessary because of automation and mechanization must go. And any other course is not consistent with the efficiency, competitive ability, and powers of this country and its free enterprise system." 109 Cong. Rec. 15057 (Senator Cotton).

²⁶ E.g., House Hearings, pp. 183, 804-805; Senate Hearings, pp. 367, 501, 669-670, 663.

been made by the President when he asked the Congress to act.²⁷ As was found by Arbitration Board No. 282, there was a considerable area of tentative agreement among the parties with respect to the nature of the provisions that should be made for the protection of employees already in service (R. 110, 112, 124-128, 136-137). Thus, when Congress provided in Sections 3 and 7(a) of Public Law 88-108 that the Board should "incorporate" the parties' agreements in its Award and give "due consideration" to their "tentative agreements," it surely contemplated that such protective provisions almost certainly would be included in the Award. That the Congress *specifically* intended the inclusion of such provisions was made clear during the debate in the Senate. A proposal to amend the Joint Resolution to require the Board, in terms, to incorporate such provisions in its Award was withdrawn by its sponsor when the Chairman of the Senate Commerce Committee explained that such a requirement was implicit in the provisions of the Senate bill. (109 Cong. Rec. 15122-15123; see also H. R. Rep. No. 713, 88th Cong., 1st Sess., pp. 8, 9, 12, 23-24, 25-26.)

Accordingly, the Board did just what the Congress expected when it authorized the elimination of unneeded positions, subject, however, to comprehensive arrangements for the protection of the employees similar in nature to those recommended by the earlier tribunals and by the President. Examination of those provisions shows that they are entirely irreconcilable with the notion that the solution was meant to be merely a temporary expedient. The Award provided substantial separation allowances in amounts equal to one year's pay for most firemen whom the railroads were permitted to separate from service. (Award, II, C-2,

²⁷ These recommendations were given extensive and detailed study during the hearings on the Administration bill. See note 9, p. 14, *supra*.

C-3, C-6, R. 86-87.) It provided relocation allowances and guarantees against reductions in wages effective for *five years* for men who were offered and given comparable jobs in other crafts. (Award, II, C-6, R. 86-87.) It provided that other firemen should retain the right to engine service assignments, not for two years, but, in effect, for the remainder of their careers—i.e., until “retired, discharged for cause, or otherwise removed from the carrier’s active working lists of firemen . . . by natural attrition.” (Award, II, C-7, R. 87.) And it provided a similar life-time guarantee for all train crew employees employed on the effective date of the Award. (Award, III, D-2, R. 94-95.)

It would be utterly absurd to suppose that the Congress intended that the railroads should pay millions of dollars in separation pay to eliminate unneeded positions and stimulate the transfer of trained personnel to other occupations, only to be required after a few months to hire new untrained men to fill the very same positions. Not beside the point in this connection is the fact that the appellant labor organizations do not suggest that when the two-year period during which the Award is “in force” has ended, the “five-year” wage guarantees, for example, will no longer be effective.

Rather, what the Congress intended, as it said in Section 3 of the Joint Resolution, was that the Award should “constitute a *complete and final disposition*” of the issues in dispute. By providing a “complete and final disposition” of those issues, the Award put an end to the particular dispute which had already continued for four years and threatened to erupt in a nationwide railroad strike, and furnished a point of departure for collective bargaining in the future.

To be sure, the Congress provided for eventual expiration of both Public Law 88-108 and the Award, as such. But

the Congress did not intend, by so providing, to make the Award any the less a "complete and final disposition" of the dispute that the Award resolved. Rather, as the Congress said in the Preamble to the Joint Resolution, it sought to achieve its ends in a way that "preserves and prefers solutions reached through collective bargaining." See pp. 35-37, *supra*. Accordingly, it provided for expiration after two years so that the parties might resume normal relations under the Railway Labor Act. As the Chairman of the House Commerce Committee explained during the debate in the House (109 Cong. Rec. 15279):

"[W]e have been trying to take a course that would bring these issues to final resolution where they could be settled. The resolution provides that on the two major issues, the order of the arbitration board would be in force for a period of 2 years. Then the issues go back under the regular established procedure of collective bargaining."

The Congress achieved that objective by integrating the arbitration into the Railway Labor Act. It rejected the solution proposed by the President—"interim" regulation of all issues raised by the parties' notices by the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act—and provided instead for a "complete and final disposition" of the two manning issues by a seven-man arbitration board in accordance with Sections 7 through 9 of the Railway Labor Act. It provided in Section 4 of Public Law 88-108 that, to the extent possible, "the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, [and] the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act." In sum, as was stated in the Senate Committee report, the Joint Resolu-

tion "adopt[ed] the time-tested provisions of the Railway Labor Act" in effectuating the Congress' purpose of insuring a peaceful settlement of the work-rules dispute "by collective bargaining where possible and by arbitration where bargaining has not succeeded." S. Rep. No. 459, 88th Cong., 1st Sess., p. 3.

However, because an arbitration under the Railway Labor Act requires an agreement to arbitrate, the provisions of which are governed by Section 8 of the Act, and because the parties had agreed in principle to arbitration but had "been unable to agree upon the terms and procedures of an arbitration agreement" (P.L. 88-108, Preamble²⁸), the Congress had to write the equivalent of an arbitration agreement for them. It did that in Public Law 88-108; in this respect the Joint Resolution supplanted the usual agreement to arbitrate. *Brotherhood of L.F. & E. v. Chicago, B. & Q. R. Co.*, *supra*, 225 F. Supp., at 18. Thus, where the Administration bill had provided for interim ICC rules that would "remain operative" for two years, Public Law 88-108 provided in the language of Section 8(j) of the Railway Labor Act that the Award "shall continue in force" for a similarly limited period.²⁹ Presumably, there-

²⁸ "Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and conditions of an arbitration agreement." P. L. 88-108, Preamble; see also S. Rep. No. 459, 88th Cong., 1st Sess., pp. 3, 9; H.R. Rep. No. 713, 88th Cong., 1st Sess., pp. 3, 12-13.

²⁹ Section 8 of the Railway Labor Act provides that: "The agreement to arbitrate . . . (j) shall . . . fix the period during which the award shall continue in force. . . ." The last sentence of Section 4 of Public Law 88-108 provides that: "The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."

sion was intended to mean what it means in
way Labor Act arbitration agreement.

Railway Labor Act—unlike what may be the
ies not governed by that Act—the expiration
during which an arbitration award is “in
t terminate the parties’ obligation to comply
prescribed by the award. Section 6 of the
carriers and labor organizations to “give
days’ written notice of an intended change
affecting rates of pay, rules, or working
Therefore, when an arbitration award settles
hich such a notice gives rise, unless it denies
change entirely, it effects a change in, and its
gly become a part of, the existing agreements
arties—just as did the Award, *in terms*, in
onsequently, the effect of duration provisions
abor arbitration award is governed by the
vern the termination of railway labor agree-

are provided by the “major disputes” provi-
ilway Labor Act,⁵² in particular the require-

(1) of the Award, for example, provides that: “All
regulations, interpretations, and practices, however
respect to the employment of firemen (helpers) shall
ed except as modified by the terms of this Award.”

pointed out by appellees (Br. p. 62, n. 43), the “agree-
in Section 6 of the Railway Labor Act (which requires
proposed “changes in agreements”) include arbitration
ursuant to agreements to arbitrate entered into under
Act. The purpose of Section 6—to encourage peaceful
-management disputes—is equally applicable whether
prescribed by a collective bargaining contract, as such,
ion award. In both cases, the terms of employment
ntended to create a continuing status which could be
king the steps required by the “major disputes” pro-
way Labor Act.

52 *First, Second, Seventh*, 155-160. Those provisions
uty to “exert every reasonable effort to make and main-

ment of Section 6 that carriers and labor organizations "give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions." After the expiration of an agreement, "unless the terms of the agreement were still to be followed there would be 'an intended change,' which would bring into play the thirty-day notice provision of § 6." *Manning v. American Airlines*, 329 F.2d 32, 34 (2d Cir. 1964). Accordingly, the terms of the expired agreement continue to govern the terms and conditions of employment, in the railroad industry, until they are changed in the manner prescribed by the Act—i.e., through service of the required notice and pursuit of a peaceful settlement through the prescribed statutory procedures. *Ibid.* "The effect of § 6 is to prolong agreement subject to its provisions regardless of what they say as to termination." *Ibid.* "[T]he very purpose of § 6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties' intentions" as expressed in termination provisions included in their contracts. *Ibid.*²²

tain agreements concerning rates of pay, rules, and working conditions (Section 2 *First*), and the specific duty, referred to in the text above, to give notice of intended changes in such agreements (Section 6). Following service of such a notice, the parties must proceed with conferences (Sections 2 *Second* and 6), mediation (Sections 5 and 6), arbitration, if agreed to by both parties (Sections 7-9), and emergency board proceedings, if an emergency board is appointed by the President (Section 10). The purpose of those provisions, as stated in the Railway Labor Act itself, is to facilitate the settlement of disputes as to rates of pay, rules, and working conditions, "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Section 2 *First*.) See *California v. Taylor*, 353 U.S. 553, 566 (1957).

²² The desirability as a matter of policy of the holding in *Manning*, that an expired railway labor agreement continues to govern rates of pay, rules, and working conditions until they are changed in the manner prescribed by the "major disputes" provisions of the Railway Labor Act—a holding required by the terms of Section 6—is evident from an examination of the alternative possibilities. (1) If, upon expira-

To summarize, the Congress contemplated a relatively short period in which the parties could adjust to the new work rules prescribed by the Arbitration Award without being subjected to economic pressures designed to bring about a change in those work rules. During that period of adjustment, eventually established at two years, the Award is to "continue in force" by its own terms, and "the regular established procedure of collective bargaining" under Section 6 of the Railway Labor Act, including the possibility of resort to strikes or other self help once the procedures of Section 6 are exhausted, is in effect suspended. After the expiration of the two-year period of adjustment, the Award no longer continues in force and the parties are free to resume collective bargaining pursuant to the "regular established procedure" prescribed by Section 6. But until changed pursuant to such collective bargaining, the work rules prescribed by the Award continue in effect; those work rules constitute the *status quo* upon which the collective bargaining must be based. Thus, the Congress accomplished what it set out to do: to provide a "final

tion, the parties to such an agreement were free immediately to use self-help to effect changes in the rates of pay, etc., which existed under the expired agreement—i.e., if the carriers could effect such changes unilaterally and the unions could strike to obtain such changes—the statutory procedures designed to facilitate the amicable settlement of major disputes would be avoided entirely, thus defeating their purpose. (2) Automatic reversion to earlier rules—to a "*status quo*" which has long since ceased to exist—would create a host of frequently insurmountable practical problems, as this case illustrates well. (3) The third and last alternative to the holding in *Manning* is that after expiration there simply is no binding agreement with respect to the subject matter of the expired agreement, in which case the carrier would be free to do as it chooses with respect to that subject matter, while the employees, to obtain a "change in agreements" to cover that subject matter, would be obliged to serve Section 6 notices and exhaust the statutory "major disputes" procedures before they might strike in opposition to whatever practices the carrier chooses to follow. The untenable nature of these alternatives demonstrates the soundness of the holding in *Manning* and of its application here.

resolution" of the original dispute growing out of the old work rules, and then, after two years, to remit the parties to "the regular established procedure of collective bargaining" (109 Cong. Rec. 15279) under Section 6 of the Railway Labor Act if changes in the work rules established by the Award should then be desired.

Indeed, the labor organizations themselves have recognized on occasion that the requirements of the Railway Labor Act with respect to such termination provisions are as we describe them here. For example, counsel for the BLE even expected such results under the somewhat different measure proposed by the President.³⁴ He testified before the House Commerce Committee that the effect of the expiration of the "interim" ICC rules provided for in the Administration bill would be that (House Hearings, p. 682):

"[W]e would be enabled to serve a notice under section 6 of the Railway Labor Act and begin at that time

³⁴ The Administration bill provided for "interim" regulation by the I.C.C. of the subject matter of the parties' original notices for a two-year period. Accordingly, divergent views as to the effect of the expiration of the I.C.C. rules were expressed during the hearings on that bill. The Secretary of Labor thought that the parties' original notices would remain in effect, see Senate Hearings, pp. 81-82, in which case the parties might have been free to use self-help, pursuant to those notices, immediately after the I.C.C. rules expired. On the other hand, as indicated in the text above, counsel for the BLE was of the view that the effect of expiration of the I.C.C. rules would be governed by Section 6 of the Railway Labor Act, and therefore, that new Section 6 notices would be required if any of the parties to the dispute desired to change the practices followed pursuant to the I.C.C. rules after their expiration. Of course, whatever the case under the Administration bill, for reasons indicated above the Joint Resolution settles the problem by providing for arbitration under the Railway Labor Act. Moreover, by providing that the Award should "constitute a complete and final disposition" of the issues raised by the parties' original notices (P.L. 88-108, § 3)—language that first appeared in the Senate committee bill and that had not been used in the Administration bill—Congress put a complete and final end to the dispute under those notices and, as indicated in the text herein, a point of departure for collective bargaining in the future.

a procedure for bargaining to change the rules in the light of what we then wished to suggest to the carriers. There would be another crisis if we persist in the same way to the very end. . . ."

Similar views were expressed by counsel for the BRT in litigation involving the validity of an award by a special board of adjustment convened pursuant to the crew consist provisions of the Award by Arbitration Board No. 282.³⁵ Moreover, the BRT has served notices on carriers throughout the nation, purportedly pursuant to Section 6, which in substance propose a new agreement to restore discontinued

³⁵ *Brotherhood of Railway Trainmen v. Chicago, M., St. P. & Pac. R. Co.*, 237 F. Supp. 404 (D.D.C. 1964), remanded, 345 F.2d 985 (D.C. Cir. 1965). The remarks in question were as follows:

"The carrier asserts here that the [reduction in crews proposed by the carrier in notices served pursuant to the crew consist provisions of Award 282] was also very important to the carrier because Award 282 had a two-year limit in which the procedures that were described in the award could be carried out by the carrier. But the difference is that the carrier had proposed a change in the rule which required a conductor and two brakemen and, if the change in the rule was granted by the Special Board of Adjustment, before the three-man crew could return, a new change in the rule would have to be made. And so that the time that . . . Award 282 was talking about in our view was the time in which to propose, negotiate, and litigate a proposed change in the rule, and was not the time limits in which the changed rule would be kept in effect.

"And this was made clear, I think on the opening day of the argument when I asked Mr. Shea [carrier counsel] if he was conceding that the award of Mr. O'Gallagher [neutral member of the special board of adjustment] expired by its own terms as of January, 1966, and he remarked on the record that he was here only to try this case, and was making no such concession.

"So that the two-year period that was made so much of both in the carrier's brief and in the argument here is not really a two-year period at all but, for the purposes of this case, the changed rule would be permanent unless and until it is changed through other processes if that is possible." (*Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & Pac. R. Co.*, Civ. No. 1641-64, U.S. Dist. Ct., District of Columbia, Transcript of Proceedings, Sept. 9, 1964, pp. 17-18 (emphasis added).)

positions after the expiration of the Award. Such notices would hardly be necessary if the effect of expiration were to restore the pre-existing *status quo*, and accordingly are quite inconsistent with the view that the pre-existing rules somehow revive automatically.³⁶ Indeed, the BLF&E itself has so little faith in its claim concerning the pre-existing rules set forth in the notice described previously that it has also included in the notice demands similar to those made by the BRT.³⁷

The purpose of the Congress, then, was to bring the original dispute to an end and to provide a point of departure for future collective bargaining. When it enacted the Joint Resolution, it intended to provide a serious solution for a serious problem, not an elaborate (and expensive) game at the end of which the parties would start all over again. The Congress' intent would be totally frustrated if the expiration of the Award resulted in restoration of the situation that existed in 1959 when the original notices were served, and if the carriers, in consequence, were required to hire men to fill the thousands of assignments that have been eliminated under the Award. Intentionally, the Congress has altered beyond restoration the *status quo* that existed when the original notices were served, and has established a new *status quo* that was expected to extend beyond the termination of the Award by Arbitration Board No. 282 even though subject to collective bargaining after such termination.

2. *State minimum crew laws have been superseded permanently.* The principles just stated plainly will govern the situation following expiration of the Award in states that do not have minimum crew laws. They do not in them-

³⁶ See notice in Appendix III hereto.

³⁷ See Notice No. 2 in Appendix II hereto. Carrier representatives have taken the position that the BRT and BLF&E notices referred to in the text above are premature and invalid.

selves establish that the Congress intended to preempt such minimum crew laws; rather, such an intent by the Congress is demonstrated by other considerations discussed at pp. 25-38, *supra*. But the principles just stated do refute appellants' contention that preemption could not have been intended because of the "temporary" nature of the legislation and of the Award, and also refute the contention by appellants (in No. 71) that the state minimum crew laws will "revive" at the end of the two-year period of the Award even if preemption during the two-year period was intended and achieved.

As we have demonstrated, the Congress envisaged much more than a mere "temporary" change in the work rules in existence prior to the Award, after which such work rules would go back in effect and all would be as though the Joint Resolution had never been enacted. The Congress intended a "complete and final disposition" of the dispute growing out of the old work rules; the Congress intended the establishment of new work rules which would reflect and protect the justified interests of the carriers, of their employees and employee organizations, and of the public in the light of contemporary conditions including considerations of safety; and the Congress intended that the work rules thus established would govern the manning of trains not only during the two-year period of the Award, but also after the expiration of that two-year period until changed through normal collective bargaining in which the *status quo* to be considered is the work rules prescribed by the Award. Thereafter, the manning issue would be governed by collective bargaining agreements, not by minimum crew laws. In short, the Joint Resolution was intended to, and did, work a fundamental change in the previous situation both during the two-year period of the Award and thereafter.

Hence, the court below rightly concluded that "the

purpose and intent of Congress in enacting Public Law 88-108 would be frustrated by reinstatement of state crew consist laws upon the expiration of the awards . . . " (R. 273). Those laws have been preempted not just for two years, but permanently.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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Of Counsel

APPENDICES

Appendix I

Members of National Railway Labor Conference*

Akron & Barberton Belt R. Co.
Akron, Canton & Youngstown R. R.
Alton & Southern R. Co.
Ann Arbor R. Co., The
Atchison, Topeka & Santa Fe Ry. System, The
Atlanta & West Point R. Co.
Atlantic Coast Line R. R.
Baltimore & Ohio R. Co., The
Baltimore & Ohio Chicago Terminal R. R.
Bangor & Aroostook R. Co.
Belt Ry. Co. of Chicago, The
Bessemer & Lake Erie R. Co.
Birmingham Southern R. Co.
Boston & Maine R.
Brooklyn Eastern District Terminal
Buffalo Creek R. R.
Bush Terminal R. Co.
Butte, Anaconda & Pacific Ry. Co.
Camas Prairie R. Co.
Canadian National Rys.
Canadian Pacific Ry. Co.
Central R. Co. of N. J., The
Central Vermont Ry.
Chesapeake & Ohio Ry. Co., The
Chicago & Eastern Ill. R. Co.
Chicago & Illinois Midland Ry. Co.
Chicago & North Western Ry. Co.
Chicago & Western Indiana R. Co.
Chicago, Burlington & Quincy R. Co.
Chicago Great Western Ry. Co.

* Excluding wholly-owned subsidiaries of listed member carriers.

Chicago, Milwaukee, St. Paul & Pacific R. Co.
 Chicago Produce Terminal Co.
 Chicago, Rock Island & Pacific R. Co.
 Chicago Short Line Ry. Co.
 Chicago Union Station Co.
 Chicago, West Pullman & Southern R. Co.
 Cincinnati Union Terminal Co., The
 Clinchfield R. Co.
 Colorado & Southern Ry. Co., The
 Colorado & Wyoming Ry. Co.
 Columbus & Greenville Ry. Co.
 Davenport, Rock Island & North Western Ry. Co.
 Dayton Union Ry.
 Delaware & Hudson R. Corp.
 Denver & Rio Grande Western R. Co., The
 Denver Union Terminal Ry. Co., The
 Des Moines Union Ry. Co.
 Detroit & Mackinac Ry. Co.
 Detroit & Toledo Shore Line R. Co., The
 Detroit Terminal R. Co.
 Detroit, Toledo & Ironton R. Co.
 Duluth, Missabe & Iron Range Ry. Co.
 Duluth Union Depot & Transfer Co., The
 Duluth, Winnipeg & Pacific Ry.
 East St. Louis Junction R. R.
 Elgin, Joliet & Eastern Ry. Co.
 El Paso Union Passenger Depot Co.
 Erie Lackawanna R. Co.
 Fort Street Union Depot Co., The
 Ft. Worth & Denver Ry. Co.
 Ft. Worth Belt Ry. Co.
 Galveston, Houston & Henderson R. Co.
 Galveston Wharves
 Georgia R. R.
 Grand Trunk Western R. Co.
 Great Northern Ry. Co.
 Green Bay & Western R. Co.
 Gulf, Mobile & Ohio R. Co.
 Houston Belt & Terminal Ry. Co.
 Illinois Central R. Co.

Illinois Northern Ry.
 Illinois Terminal R. Co.
 Indianapolis Union Ry. Co.
 Jacksonville Terminal Co.
 Kansas City Southern Ry. Co., The
 Kansas City Terminal Ry. Co.
 Kentucky & Indiana Terminal R. R.
 Lake Erie, Franklin & Clarion R. Co.
 Lake Superior & Ishpeming R. Co.
 Lake Superior Terminal & Transfer Ry. Co.
 Lake Terminal R. Co., The
 Lehigh & Hudson River Ry. Co., The
 Lehigh Valley R. Co.
 Long Island R. Co., The
 Longview, Portland & Northern Ry. Co.
 Los Angeles Junction Ry.
 Louisville & Nashville R. Co.
 Maine Central R. Co.
 Manufacturers Ry. Co.
 McKeesport Connecting R. Co.
 Minneapolis, Northfield & Southern Ry.
 Minnesota & Manitoba Ry.
 Minnesota, Dakota & Western Ry. Co.
 Minnesota Transfer Ry., The
 Mississippi Central R. Co.
 Missouri-Kansas-Texas R. Co.
 Missouri Pacific R. Co.
 Monon R. R.
 Monongahela Connecting R. Co., The
 Monongahela Ry. Co., The
 Montour R. Co.
 Nevada Northern Ry. Co.
 Newburgh & So. Shore Ry. Co., The
 New Orleans Public Belt R. R.
 New Orleans Union Passenger Terminal
 New York Central System
 New York Dock Ry.
 New York, New Haven & Hartford R. Co., The
 New York, Susquehanna & Western R. Co.
 Norfolk & Portsmouth Belt R. Co.

& Western Ry. Co.
 Southern Ry. Co.
 mpton & Bath R. Co.
 a Pacific Ry. Co.
 stern Pacific R. Co.
 nion Ry. & Depot Co., The
 California & Eastern Ry. Co.
 vania R. R., The
 vania-Reading Seashores Lines
 e Pekin Union Ry. Co.
 phia, Bethlehem & New England R. Co.
 t & Northern Ry. Co.
 gh & Shawmut R. Co., The
 gh & Ohio Valley Ry. Co.
 gh, Chartiers & Youghiogeny Ry. Co.
 thority Trans-Hudson Corp.
 l Terminal Co.
 rminal R. R. Assn.
 Company
 d, Fredericksburg & Potomac R. Co.
 erminal Ry. Co., The
 ph Terminal R. Co.
 s-San Francisco Ry. Co.
 s Southwestern Ry. Co.
 Union Depot Co.
 go & Arizona Eastern Ry. Co.
 d Air Line R. Co.
 ity Terminal Ry. Co.
 e R. Co.
 a Pacific Company
 n Ry. System
 maha Terminal Ry. Co.
 International R. Co.
 , Portland & Seattle Ry. Co.
 Island Rapid Transit Ry. Co., The
 ee, Alabama & Georgia Ry. Co.
 ee Central Ry. Co.
 l R. R. Association of St. Louis
 l Railway, Alabama State Docks
 na Union Station Trust

Texas and Pacific Ry. Co., The
 Texas Mexican Ry. Co., The
 Texas Pacific-Missouri Pacific Terminal R. R. of New
 Orleans
 Toledo, Peoria & Western R. Co.
 Toledo Terminal R. Co.
 Union Depot Co. (Columbus, Ohio)
 Union Pacific R. R.
 Union R. Co. (Pittsburgh)
 Union Ry. Co. (Memphis)
 Union Terminal (Dallas)
 Upper Merion & Plymouth R. Co.
 Washington Terminal Co., The
 Western Maryland Ry. Co.
 Western Pacific R. Co.
 Wichita Terminal Assn.
 Wichita Union Terminal Ry. Co., The
 Winston-Salem Southbound Ry. Co.
 Youngstown & Northern R. R.

Appendix II

1965 BLF&E Notice of Proposed Changes in Rules*

NOTICE NO. 1
NOVEMBER —, 1965

[Name of Railroad Official]

[Title]

[Name of Railroad]

Dear Sir:

In accordance with the provisions of the Railway Labor Act and the agreement or agreements now in effect on the [name of carrier], please accept this as formal notice of our desire to change the collectively bargained agreement governing the employment of firemen (helpers) on other than steam power to the extent provided in Attachment "A", attached to and made a part hereof, such change to become effective at 12:01 a.m., March 31, 1966.

This proposal is made to you, notwithstanding the fact that upon the expiration of the Award of Arbitration Board 282, the collectively bargained agreement with respect to employment of firemen (helpers) will be in full force and effect. We shall expect that on and after 12:01 a.m., March 31, 1966, you will comply fully with the collectively bargained agreement with respect to employment of firemen (helpers) on this property, unless another agreement has been reached in the meantime.

Please advise pursuant to Section 6 of the Railway Labor Act the time, date and place where conference may be held to discuss this notice.

Very truly yours,

[Name]

General Chairman,
Brotherhood of Locomotive
Firemen and Enginemen

* Served on carrier parties to Award 282 on or about November 15, 1965.

NOTICE NO. 1
NOVEMBER —, 1965
ATTACHMENT "A"

Section A:

1. Firemen (helpers) taken from the seniority ranks of the firemen shall be used on all locomotives in road and yard service, except as specifically provided in Section B.

Section B:

1. DAYLIGHT YARD JOBS, other than those:

- (a) Engaged in switching passenger cars and equipment, or
- (b) Engaged in belt line, transfer, interchange or industrial work, or
- (c) Which are consistently on duty more than eight (8) hours, or
- (d) Whose operations are not confined to an area from which other engines operated without firemen (helpers) are excluded during the period the job works, or
- (e) On which there is need for an employee on the locomotive to relay signals or perform lookout functions by reason of such conditions as curvatures of tracks, overhead or other obstructions, close clearances, unprotected crossings, dangers arising out of mainline movements, hazard to the public or railroad employees, or imposition of onerous working conditions on the engine or train crew.

2. DAYLIGHT BRANCH LINE JOBS, other than those where:

- (a) The number of units in the locomotive consist exceeds one, or
- (b) The total time on duty may be expected to exceed eight (8) hours,
- (c) The total miles run exceeds one hundred (100), or
- (d) The maximum speed on branch line exceeds thirty (30) miles per hour.

- (e) The maximum number of cars in the train may be expected to exceed thirty-five (35), or
- (f) The continuous movement of the train or engines exceeds two (2) hours without relief, or
- (g) Onerous working conditions would be imposed on the members of the engine or train crew if a fireman was not used.

Section C:

1. Notwithstanding the provisions of Section B, a job may be operated without a fireman (helper) only when it becomes necessary to hire a fireman (helper).

2. A junior fireman (helper) may be required to protect jobs in Section B if same is necessary to avoid a new hire.

Section D:

1. The carrier shall hire and place on the firemen's seniority roster sufficient firemen (helpers) to comply with the provisions of this agreement.

NOTICE NO. 2
NOVEMBER —, 1965

[Name of Railroad Official]

[Title]

[Name of Railroad]

Dear Sir:

In accordance with the provisions of the Railway Labor Act and the agreement or agreements now in effect on the [name of carrier], please accept this as formal notice of our desire to negotiate an agreement incorporating the provisions of Attachment "A", attached to and made a part hereof, such agreement to become effective at 12:01 a.m. March 31, 1966.

Please advise pursuant to Section 6 of the Railway Labor Act the time, date and place where conference may be held to discuss this notice.

Very truly yours,

[Name]

General Chairman,

Brotherhood of Locomotive
Firemen and Enginemen

NOTICE NO. 2
NOVEMBER —, 1966
ATTACHMENT "A"

SECTION A.

Employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on March 31, 1966, be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers) in accordance with the agreement in effect on March 31, 1966. Employees restored to the seniority roster will be considered to have continuous service in the application of the vacation and other agreements. The railroad will, on or before March 31, 1966, by registered letter notify firemen (helpers) whose employment has been terminated by the railroad's application of the Award of Arbitration Board 282 at their last known address of the restoration of the individual's seniority. Failure of the individual to report for service within thirty (30) days of receipt of the registered letter will be considered to be a forfeiture of all seniority rights.

SECTION B.

Individuals restored to the seniority roster in the application of Section A hereof shall be reimbursed for any monetary loss sustained as result of improper termination.

SECTION C.

Employees who have been deprived of rights, during the term of the Award of Arbitration Board 282, to exercise their seniority in accordance with applicable schedule provisions in effect on January 24, 1964, will be reimbursed for all monetary losses sustained as a result of deprivation of such seniority rights.

SECTION D.

Employees who, as a result of the carrier's application of the Award of Arbitration Board 282, have incurred expenses such as, but not limited to, travel, lodging and meals

in being required by the carrier to man assignments operating out of other than the point where their residence is maintained shall be reimbursed for such expenses.

SECTION E.

Employees who have experienced monetary loss as result of sale of their homes by reason of the carrier requiring such employees to man assignments at points other than where their original residence was maintained will be reimbursed for the loss incurred. Additionally, such employees will be reimbursed for moving expenses.

SECTION F.

Employees changing their point of residence as result of the carrier requiring such employees in the application of the Award of Arbitration Board 282 to man assignments out of points other than where original residence was maintained will be reimbursed for moving expenses.

NOTICE NO. 3
NOVEMBER —, 1965

[Contents Omitted.]

Appendix III**1965 BRT Notice of Proposed Changes in Rules*****REGISTERED****RETURN RECEIPT REQUESTED**

**BROTHERHOOD OF RAILROAD TRAINMEN
General Grievance Committee
Missouri Pacific System
320 Buder Building
St. Louis Missouri**

June 30, 1965

**Mr. B. W. Smith, Director of Labor Relations
Missouri Pacific Railroad Company
Missouri Pacific Building
St. Louis, Missouri 63103**

Dear Sir:

The undersigned, representative of the Brakemen of the Missouri Pacific Railroad Company, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized, under the laws and rules of procedure of the Organization, to submit to you notice of desire to change, effective January 26th, 1966, the said agreements as set forth below:

Effective January 26th, 1966, a rule shall be inserted in the respective agreements between the parties applying to brakemen, which will provide that crews in passenger service, through and irregular freight service, helper service, work service and traveling switch engines, shall consist of not less than two (2) brakemen (trainmen).

Effective January 26th, 1966, a rule shall be inserted in the respective agreements between the parties applying to brakemen which will provide that local freight and mixed

* Similar notices were served on various carrier parties to Award 282 at different times during the summer of 1965.

train service crews shall consist of not less than three (3) brakemen (trainmen).

Therefore, in accordance with the provisions of the Railway Labor Act, as amended, and current agreements covering rates of pay, rules and working conditions of the employees herein covered, you will please accept this as formal notice of our desire to change the said agreements as set forth above.

Please reply to this proposal in writing to the undersigned General Chairman within ten days, fixing date within the provisions of the Railway Labor Act when conference with you may be had for the purpose of discussing these matters.

It is the request that all lines or divisions of railway operated by the Missouri Pacific Railroad shall be included in settlement of these matters, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

A. F. SMITH
General Chairman, B. of R. T.

AFS/h

cc: C. Luna, President, BRT

Appendix IV

Crew Consist Agreement of January 29, 1965*

New York, N. Y.
January 29, 1965

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

Dear Mr. Luna:

This refers to our recent discussions with you concerning crew consist in states comprising the eastern territory and particularly the necessity, in the interest of the railroads, their employees and the public, for repeal of the so-called full crew laws.

During our discussion you indicated there was an area subject to agreement that would provide protection for the employees you represent and thereby eliminate your opposition to repeal of existing full crew laws. In line with this discussion and on behalf of the eastern railroads that are shown on the attached sheet designated as Attachment "A", we offer the following:

1. On all railroads, parties to this Agreement, the provisions of the Award of Arbitration Board 282 will continue to be applicable, including decisions of special

* The following railroads (excluding subsidiaries of listed railroads) had signed the January 29, 1965 crew consist agreement with the BRT as of November 4, 1965: Ann Arbor R. Co.; Baltimore & Ohio R. Co.; Bessemer & Lake Erie R. Co.; Canadian National Rys.; Central Vermont Ry.; Delaware & Hudson R. Corp.; Detroit, Toledo & Ironton R. Co.; Erie-Lackawanna R. Co.; Grand Trunk Western R. Co.; Lehigh & Hudson River R. Co.; Lehigh Valley R. Co.; Long Island R.R.; Monon R. Co.; Montour R. Co.; New York Central System; New York, New Haven & Hartford R. Co.; New York, Susquehanna & Western R. Co.; Pennsylvania R. Co.; Pennsylvania-Reading Seashore Lines; Pittsburgh, Chartiers & Youghiogheny R. Co.; Youngstown & Southern R. Co.

boards of adjustments and agreements between the parties arising under the Award's provisions, until the specified termination date of the Award (January 25, 1966), except in states having so-called full crew laws in effect the ground road and yard crew consist provisions of which may be repealed prior to the January 25, 1966 termination date. In the event the ground road and yard crew consist provisions of the full crew law is repealed in one or more of the states presently having such laws, in which one or more of the carriers, parties to this Agreement operate, the provisions of this Agreement shall become effective in that State coincident with such repeal or on and after January 25, 1966, whichever date is earlier.

2. On and after January 25, 1966 (or on and after the earlier effective date in a particular state resulting from the repeal of the ground road and yard crew consist portion of the full crew laws in such states having such laws), a rule shall be inserted in the respective agreements between the parties to this Agreement applying to ground road and yard service employees which will provide for a crew consist on all ground road and yard crews in all classes of road and yard service of not less than a conductor (foreman) and two (2) trainmen (helpers), including assistant conductors, ticket collectors, baggagemen, brakemen and flagmen; provided, however, that on railroads which had established crew arrangements prior to January 25, 1964, which permitted crews to be operated with less than two (2) trainmen (helpers), such crew arrangements shall remain in effect subject to change in accordance with the provisions of paragraph 6 hereof. The aforementioned crew consist rule shall not apply to self-propelled devices, light engine, helper and exchange engine movements, which shall be manned in accordance with existing agreements in effect with the organization signatory hereto.

3. In any case in which the carrier has called or filled a crew in accordance with the foregoing paragraph and the consist of such crew falls below the prescribed minimum by reason of the failure of a crew member to report, or by being separated from the crew after reporting, such crew will function in accordance with existing rules.

4. The carriers shall have the right to discontinue the use of trainmen in excess of minimum crew consist established by paragraph 2, except that the carriers will comply with the provisions of agreements or full crew laws in effect on the date of this Agreement with respect to the employment of trainmen in excess of the minimum crew consist provided by paragraph 2 so long as it is necessary to do so in order to provide employment for trainmen with seniority dates prior to January 25, 1964, who were not in a furlough status on that date and for whom no other employment in train service on their seniority district is available at his governing terminal (home or away from home as the case may be).

5. Upon acceptance of this Agreement the Brotherhood of Railroad Trainmen will immediately withdraw all opposition to repeal of existing statutory and regulatory minimum crew requirements and from participation in any litigation concerning the legality of such requirements in the states covered by this Agreement. Further, the Brotherhood will not institute or support the adoption of any new minimum crew consist laws or regulations in the states covered by this Agreement while this Agreement is in effect.

6. This Agreement will continue in effect until January 1, 1970, and thereafter until changed in accordance with the provisions of the Railway Labor Act, as amended.

If you are in accord with the foregoing, please indicate your acceptance by affixing your signature in the space provided below.

Very truly yours,

s/ A. E. PERLMAN,
President,
New York Central Railroad

s/ STUART T. SAUNDERS,
Chairman of the Board,
Pennsylvania Railroad

s/ WM. WHITE,
Chairman,
Erie-Lackawanna Railroad

Accepted:

s/ CHARLES LUNA
President,
Brotherhood of Railroad Trainmen

ATTACHMENT "A"

[List of original carrier parties, omitted.]

(Applies to all states in which the above railroads operate in the United States.)

(6861-9)

FILE COPY

Office-Supreme Court, U
FILED

No. 69
(Consolidated with No. 71)

DEC 7 1965

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHER-
HOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CON-
DUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF
NORTH AMERICA _____ *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN
FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWEST-
ERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY _____ *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

REPLY BRIEF FOR THE APPELLANTS

JAMES E. YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201
Attorney for the Appellants

Of Counsel:
EUGENE F. MOONEY
McMATH, LEATHERMAN, WOODS & YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201

THE SUPREME COURT OF THE UNITED STATES

REPORT OF THE COURT

OF THE SUPREME COURT OF THE UNITED STATES
IN THE CASE OF
THE UNITED STATES OF AMERICA
V.
THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA
V.
THE UNITED STATES OF AMERICA

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V.
THE UNITED STATES OF AMERICA

THE DISTRICT OF COLUMBIA
V.
THE UNITED STATES OF AMERICA

THE DISTRICT OF COLUMBIA
V.
THE UNITED STATES OF AMERICA

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No. 69
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SUPREME COURT OF THE UNITED STATES

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OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHER-
HOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CON-
DUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF
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ERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC
RAILWAY COMPANY _____ *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

REPLY BRIEF FOR THE APPELLANTS

ARGUMENT

I. THE CONTENTION THAT PUBLIC LAW 88-108 PREEMPTS
PERMANENTLY IS DIRECTLY CONTRARY TO ITS LANGUAGE AND
WITHOUT FOUNDATION.

The railroads contend that Public Law 88-108 *perma-
nently* supersedes full crew laws.¹ This argument was dis-

¹Brief for Appellees, 56-67.

cussed to some degree in the principal briefs for the brotherhoods³ and the State of Arkansas,⁴ but deserves further analysis as the contorted extremity of the railroad effort to bypass congressional power—past and future.

The language of the resolution is unambiguous. Under Section 4, "The award shall continue in full force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."⁵ R. 77. Under Section 8, "This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence." R. 78.

The direct statements of the statute are reconfirmed by the legislative history.⁶ The Senate committee reported:

Under the terms of the resolution, the arbitration award would be binding for no more than 2 years, unless the parties mutually agree to a different period. The committee has imposed this limitation in harmony with the President's recommendation, in order to closely limit the scope and impact of the resolution.

³Brief for the Appellants (No. 69), 29-30, n. 17 (and see cases cited therein). This discussion does not imply, of course, a concession of preemption for any period of time.

⁴Brief for Appellants (No. 70), 26-30.

⁵There has been no agreement, other than to extend the duration of the award to March 31, 1966. See Brief for Appellees, 56-57.

⁶The temporal limitation relates, *inter alia*, to congressional reluctance to act at all. See Brief for the Appellants (No. 69), 28-31. "[The resolution] is what it purports to be—a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." S. REP. NO. 459, 88th Cong., 1st Sess., 7 (1963). Such peril, the railroads need to be reminded, was a strike growing out of a specific bargaining impasse, not "make work practices" (Brief for Appellees, 34, n. 11) or "featherbedding" of any dimension.

S. REP. No. 459, 88th Cong., 1st Sess., 10 (1963). The House committee concurred. H.R. REP. No. 713, 88th Cong., 1st Sess., 14, 15 (1963).

The arbitrators had no difficulty understanding the metes of their authority. Their statement of duration repeated congressional terminology. "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." R. 95. The neutral members of the panel noted:

In approaching our task we have been fully aware of the handicaps imposed upon us not only by our relative unfamiliarity with the complex problems of railroad operation but also by the narrow time limits within which we have been compelled by the Joint Resolution to complete our work. . . . The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small.

R. 98-99.

But reliance on language too clear for misunderstanding, the railroads maintain, "amounts to little more than a play on words." Brief for Appellees, 59. Support for this startling proposition, it is argued, must be adduced from "the general interests to be served by the legislation," as distinguished from the words used by the legislators.

The device which the railroads contrive to give color to negation of congressional language on the duration of the award is a relationship between Public Law 88-108 and the Railway Labor Act, described as "integration," "keying in," or "pouring into a mold."⁴ But reference to the

⁴On less expansive occasions, the railroads appear to concede that only the "procedural framework" or the "mechanics" of the Railway Labor Act are involved. Brief for Appellees, 44, 60. Further, mere inclusion within the scheme of federal labor law does not impel total preemption if the legislative history of the particular portion is to the contrary. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

Railway Labor Act in Public Law 88-108 is confined to the simplest mechanics of procedure. R. 77. There is more allusion to the Department of Labor and other executive agencies than Railway Labor Act operation. *E.g.*, preamble, Sections 3, 6, 7. R. 76-78.

All expressions of intent make it clear that an *ad hoc* board free of the strictures of *any* established "scheme" embodies the legislative will. Congress chose an "independent" "new and separate board" to handle the dispute. S. REP. No. 459, 88th Cong., 1st Sess., 9.

The import—if not the intent—of a contrary contention undermines future as well as past congressional decisions. The 1965 Senate hearings on the effect of Public Law 88-108 are cited repeatedly by the railroads.⁷ *E.g.*, Brief for Appellees, 41, 50, 63. These hearings have been held to examine the effect of the 1963 resolution so that Congress can determine whether or not future action, such as an extension of the award, is advisable. But responsibility for the future which Congress evidently accepts is rendered nugatory under the railroad contention about the permanence of the award.

Here again, the railroads ask this Court to thwart legislative operation. They persuaded Congress to enact Public Law 88-108 by arguing that its effect would not be too severe because of state full crew laws.⁸ Congress limited its action temporally because of its reluctance to act at all. The railroads *now* say Congress was deceived—the full crew laws are preempted and the award does not expire in two

⁷Innuendoes about the refusal of congressional witnesses to comment on the outcome of pending litigation (Brief for Appellees, 50, 56-57) cannot suggest support for any position. See, *e.g.*, Canon No. 20, *Canons of Professional Ethics*, American Bar Assn. (1963). And surely the railroads are not serious in suggesting that sums such as \$1,425 afford "vacation with pay" for more than two years. See Brief for Appellees, 66-67.

⁸See Brief for the Appellants (No. 69), 24.

years. This position represents only cavalier disregard for the integrity of the legislative process.⁹

II. AS TO THE COMMERCE CLAUSE CONTENTION, THE ABSENCE OF ANY EVIDENCE ON THE ACTUAL OPERATION OF THE ARKANSAS FULL CREW LAWS COMPELS THE UNANIMOUS CONCLUSION OF THE COURT BELOW THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT.

A unanimous court below held that there are genuine issues of material fact which bar disposal of the commerce clause contention under the motion for summary judgment on which this case now turns. R. 239, 279. The railroads continue to dispute this conclusion,¹⁰ although there is no record on the actual operation of the Arkansas full crew laws.

Conceding that trial is necessary on the allegation that full crew laws impermissibly "burden" interstate commerce, the railroads assert impermissible "discrimination" as a matter of law. If there is ground for summary disposition of any commerce clause contention, it would be dismissal.

While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it.

Southern Pac. Co. v. Arizona, 325 U.S. 761, 782 (1945). See *Chicago, R. I. & Pac. Ry. v. Arkansas*, 219 U.S. 453 (1911).

The fine distinction which the railroads seek to draw between burdening and discriminating against interstate commerce is questionably viable for the regulation challenged at bar. The discrimination terminology occurs traditionally in tax cases. *E.g., Robbins v. Taxing District of*

⁹And, if a colloquialism may be excused, this is a classic effort by the railroads "to have their cake and eat it too."

¹⁰Brief for Appellees, 77-83.

Shelby County, 120 U.S. 489 (1887); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

In the most analogous single case in recent decisions of this Court, *Florida Lime Growers v. Paul*,¹¹ 373 U.S. 132 (1963), one issue was whether or not a state statute in "application unreasonably burdened or discriminated against interstate" activity. 373 U.S. at 135. After overruling preemption arguments, the Court remanded the case for trial, holding "that the effect of the statute on interstate commerce cannot be determined on the record now before us." 373 U.S. at 137. *Florida Lime Growers* confirms the conclusion of the court below that commerce clause contentions generally must be supported by a factual record.

The railroads admit that on the face of the Arkansas statutes interstate commerce is not treated discriminatorily and that their coverage and exceptions do not coincide with the inter-intrastate dichotomy (Brief of Appellees, 16, 78, 79), but quote *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940):

The commerce clause forbids discrimination, whether forthright or ingenious. *In each case* it is our duty to determine whether the statute under attack, whatever its name may be, will *in its practical operation* work discrimination against interstate commerce.

(Emphasis added.) The practical operation of the Arkansas full crew laws are not determinable from the summary record below.¹²

¹¹It is significant that the railroads totally ignore the *Florida Lime Growers* decision, although it is discussed at length by appellants and the court below, and deals comprehensively with the contention that different minimum standards in state and federal legislation denotes conflict compelling preemption. See Brief for Appellees, 29-32.

¹²In assumptive response to the elaborate assumptions of the railroads (Brief for Appellees, 79-81), it might be, for example, that carriers with longer total trackage regularly carry substances with substantially higher danger potential to the communities through which they pass than do short lines, necessitating greater safety precautions. Ability to pay also may be a factor; it is urged by the appellee railroads themselves. *E.g.*, R. 13.

III. THE ONLY MATERIALITY FOR REPEATED CATALOGUING OF A TREND TOWARD REPEAL OF FULL CREW LAWS IS ILLUSTRATION OF PERMISSIBLE LEGISLATIVE ACTION, NOT SUPPORT FOR JUDICIAL INVALIDATION.

The railroads describe in redundant detail the undeniable recent diminution of full crew laws through ordinary state legislative processes. Brief for Appellees, 15, 56, 57, 58, 74.

This is a curious contention. Candidly, the brotherhoods are unable to imagine any support for the legal position of the railroads which such development affords, and can only guess that its repetition is designed to convince the Court of the obsolescence of the full crew laws themselves.¹³

Such approach characterizes the entire railroad argument. They say, for example, that specific legislative history should be ignored because of broad policy factors—and that such factors are the merits of full crew laws.

But the merits of the statutes are not at issue here. To the contrary, full crew laws have been considered exhaustively by state and federal legislative bodies,¹⁴ and “the clash of fact and opinion should be resolved by the democratic process and not the judicial sword.” *International Bro. of Teamsters v. Hanke*, 339 U.S. 470, 478 (1950). The success of the railroads in persuading legislatures to repeal full crew laws illustrates only the process by which the issue should be resolved; the exclusiveness of such process is

¹³See Brief for the Appellants (No. 69), 35-42.

¹⁴The Arkansas railroad safety chapter was considered again by the state legislature in its 1965 session. A statute forbidding the placing of freight cars at the rear of passenger trains was repealed, ARK. STAT. ANN. § 73-730 (Supp. 1965), but the full crew laws were retained.

al to the position of the brotherhoods and the
function of the judiciary.

spectfully submitted,

JAMES E. YOUNGDAHL

711 West Third Street

Little Rock, Arkansas 72201

Attorney for the Appellants

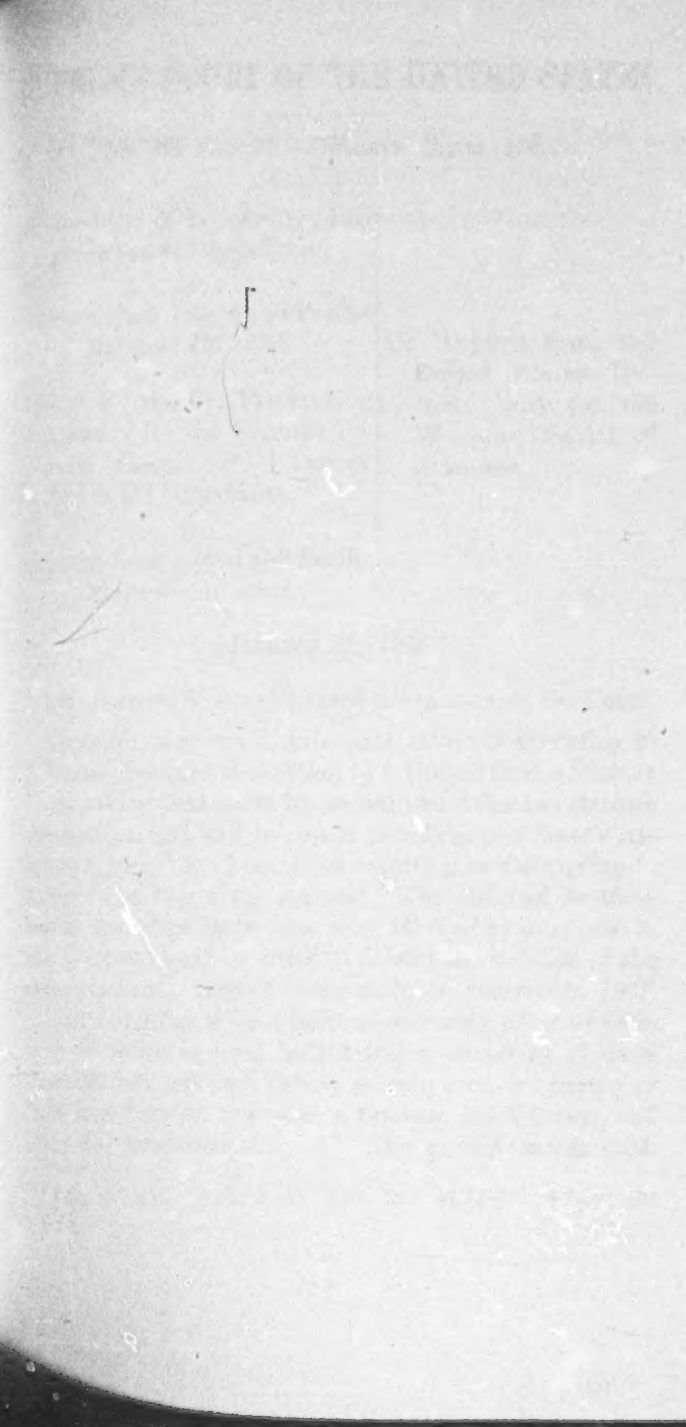
Of Counsel:

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McMATH, LEATHERMAN, WOODS & YOUNGDAHL

711 West Third Street

Little Rock, Arkansas 72201



SUPREME COURT OF THE UNITED STATES

Nos. 69 AND 71.—OCTOBER TERM, 1965.

Brotherhood of Locomotive En-
gineers et al., Appellants,

69

v.

Chicago, Rock Island and Pacific
Railroad Co. et al.

Robert N. Hardin, Prosecuting
Attorney for the Seventh Ju-
dicial Circuit of Arkansas,
etc., et al., Appellants,

71

v.

Chicago, Rock Island and Pacific
Railroad Co. et al.

On Appeals From the
United States Dis-
trict Court for the
Western District of
Arkansas.

[January 31, 1966.]

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellees, a group of interstate railroads operating in Arkansas, brought this action in a United States District Court asking that court to declare two Arkansas statutes unconstitutional and to enjoin two Arkansas State's Attorneys, appellants here, from enforcing or attempting to enforce the two state statutes. The railroad brotherhoods, also appellants here, were allowed to intervene in the District Court in order to defend the validity of the state statutes. One of those statutes, enacted in 1907, makes it an offense for a railroad operating a line of more than 50 miles to haul freight trains consisting of more than 25 cars without having a train crew consisting of "not less than an engineer, a fireman, a conductor, and three (3) brakemen" ¹ The second statute chal-

¹ Ark. Act 116 of 1907, Ark. Stat. Ann. §§ 73-720 through 722 (1957).

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lenged by the railroads, enacted in 1913, makes it an offense for any railroad operating with lines 100 miles or more in length to engage in switching activities in cities of designated populations, with "less than one (1) engineer, a fireman, a foreman and three (3) helpers . . .".² The complaint charged that, as applied to the plaintiff railroads, both statutes (1) operate in an "arbitrary, capricious, discriminatory and unreasonable" manner in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) unduly interfere with, burden and needlessly increase the cost of interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3 of the Constitution, and contrary to the National Transportation Policy expressed in the Interstate Commerce Act; (3) discriminate against interstate commerce in favor of local or intrastate commerce; and (4) by seeking to regulate and control the number of persons working on interstate railroad locomotives and cars the state statutes invade a field of legislation preempted by the Federal Government primarily through federal enactment of Public Law 88-108 passed by Congress in 1963.³ This law was passed to avert a nationwide railroad strike threatened by a labor dispute between the national railroads and the brotherhoods over the number of employees that should be used on trains.

In their complaint the railroads admitted that this Court had on three separate occasions, in 1911,⁴ in 1916,⁵ and again in 1931,⁶ sustained the constitutionality of

² Ark. Act 67 of 1913, Ark. Stat. Ann. §§ 73-726 through 729 (1957).

³ 77 Stat. 132, 45 U. S. C. following § 157 (1964 ed.).

⁴ *Chicago, R. I. & P. R. Co. v. State of Arkansas*, 219 U. S. 453.

⁵ *St. Louis, Iron Mountain & Southern R. Co. v. State of Arkansas*, 240 U. S. 518.

⁶ *Missouri Pac. R. Co. v. Norwood*, 283 U. S. 249, 290 U. S. 600. See also same cases 13 F. Supp. 24.

both the state statutes against charges, also made in this action, that the statutes violate the Fourteenth Amendment and the Commerce Clause. The complaint alleged, however, that improvements have now been so great in locomotives, freight cars, couplers, brakes, trackage, roadbeds, and operating methods that the facts on which these prior holdings rested no longer exist. The brotherhoods and the two defendant State's Attorneys answered the complaint asserting the constitutionality of the Acts and denying that there had been a change in conditions so significant as to justify any departure from this Court's prior decisions. The brotherhoods' answer alleged that modern developments had actually multiplied the dangers of railroading thus making the Arkansas statutes more necessary than ever. The pleadings therefore, at least to some extent, presented factual issues calling for the introduction and determination of evidence under prior holdings of this Court. See, *e. g.*, *Southern Pac. R. Co. v. Arizona*, 325 U. S. 761. At this stage of the trial, however, the railroads, claiming there was no substantial dispute in the evidence with reference to any relevant issues, filed a motion for summary judgment under Rule 56 Fed. Rules. Civ. Proc. alleging that: (1) Both state statutes are "pre-empted by federal legislation in conflict therewith, to wit: Public Law 88-108 and the Award No. 282 pursuant thereto; the Railway Labor Act . . .; and the Interstate Commerce Act . . . particularly the Preamble thereto;" (2) the state statutes constitute discriminatory legislation against interstate commerce in violation of the Commerce Clause; and that (3) the state statutes deny the railroads equal protection of the law in violation of the Fourteenth Amendment. Without hearing any evidence the three-judge court, convened to consider the case sustained the railroads' motion for summary judgment, holding, one judge dissenting, that the Arkansas statutes are "in substantial

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conflict with Public Law 88-108 . . . and proceedings thereunder, and are therefore unenforceable against the plaintiffs" 239 F. Supp. 1, 29. The District Court did not purport to rule on the other questions presented in the motion for summary judgment and the complaint. We noted probable jurisdiction, 381 U. S. 949.

A few weeks ago this Court held in *Swift & Co. v. Wickham*, — U. S. —, that an allegation that a state statute is pre-empted by a federal statute does not allege the unconstitutionality of the state statute so as to call for the convening of a three-judge court under 28 U. S. C. § 2281 (1964 ed.). Thus, under *Swift*, the pre-emption issue in this case standing alone would not have justified a three-judge court, and hence would not have justified direct appeal to us under 28 U. S. C. § 1253 (1964 ed.). The complaint here, however, also challenged the Arkansas statutes as being in violation of the Commerce, Due Process, and Equal Protection Clauses. In briefs submitted to us after oral argument the appellants have argued that all these constitutional challenges are so insubstantial as a matter of law that they are insufficient to make this an appropriate case for a three-judge court. We cannot accept that argument. Whatever the ultimate holdings on the questions may be we cannot dismiss them as insubstantial on their face. Nor does the fact that the pre-emption issue alone was passed on by the District Court keep this from being a three-judge case. Had all the issues been tried by the District Court and had that court enjoined enforcement of the state laws on pre-emption alone, we would have had jurisdiction of a direct appeal to us under 28 U. S. C. § 1253 (1964 ed.). *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73. The same is true here where the state laws were enjoined on the basis of pre-emption

but the other constitutional challenges were left undecided. Thus we have jurisdiction and so proceed to the merits.

I.

We first consider the question of pre-emption. Congress unquestionably has power under the Commerce Clause to regulate the number of employees which shall be used to man trains used in interstate commerce. In the absence of congressional legislation on that subject, however, the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public. This Court said in *Missouri Pac. R. Co. v. Norwood*, one of the previous decisions upholding the constitutionality of these Arkansas statutes, that:

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for regulation of the number of men to be employed in such crews." 283 U. S., at 256.

See also the same case, 290 U. S. 600.

In view of *Norwood* and the two preceding cases, all of which sustained the constitutionality of the Arkansas statutes over charges of federal pre-emption, the question presented to this Court is whether in adding the 1963 compulsory arbitration Act to previous federal legislation, Congress intended to pre-empt this field and supersede state legislation like that of Arkansas, or stated another way, whether application of the Arkansas law "would operate to frustrate the purpose of the [1963] federal legislation." *Local 20 v. Morton*, 377 U. S. 252, 258.

Since the railroad unions first gained strength in this country the problem of manning trains has presented an

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issue of constant dispute between the railroads and the unions. Some States, such as Arkansas, believing perhaps that many railroads might not voluntarily assume the expense necessary to hire enough workers for their trains to make the operations as safe as they could and should be, passed laws providing for the minimum size of the train crews. Where these laws were not in effect the question of the size of the crews was settled by collective bargaining, though not without great difficulty. It was this sensitive and touchy problem which brought on the explosive collective bargaining impasse that triggered the 1963 Act which the railroads now contend was intended to permanently supersede the 1907 and 1913 Arkansas statutes. Such a permanent supersession would, of course, amount to an outright repeal of the statutes by Congress.

The particular dispute which eventually led to the enactment of Public Law 88-108 began in 1959 when the Nation's major railroads notified the brotherhoods that they considered it to be the right of management to have the unrestricted discretion to decide how many employees should be used to man trains, and that they did not intend to submit that subject to collective bargaining in the future. The brotherhoods protested, serving counter proposals on the railroads. As a result the representatives of each side met to try to negotiate a new collective bargaining agreement. On the question of the size of the crews the negotiators stuck and would not budge. The railroad negotiators insisted that changed conditions, particularly the substitution of diesel and electrically propelled engines for steam engines, had made firemen completely unnecessary employees. They continued to insist that the railroads should be left free to decide for themselves when and how many firemen should be used, if any at all. Throughout all negotiations, and up to now, the brotherhoods have insisted that firemen are needed

even on diesel engines, particularly to aid the engineer as a lookout for safety purposes, and to help make needed repairs and adjustments while the train is moving, should the engine for any reason fail to function. Agreement on this question proving impossible in the 1959 negotiations, President Eisenhower, acting at the request of both sides, appointed a Presidential Commission to try to adjust the dispute. After long investigation and consideration the Commission reported. Its report was unsatisfactory to the brotherhoods, not wholly satisfactory to the railroads, and did not result in any settlement. The dispute dragged on. Another investigation report was made by the President's Advisory Committee on Labor-Management Policy but it also failed to bring about an agreement.

All efforts at agreement having failed, President Kennedy, on July 22, 1963, reported to Congress that on July 29 the railroads "can be expected to initiate work rules changes And the brotherhoods thereupon can be expected to strike." "The Nation," he said, "stands on the brink of a nationwide rail strike that would, in very short order, create widespread economic chaos and distress." Pointing out the disastrous consequences that might occur to the country should a strike take place, the President recommended legislation to provide "for an interim remedy while awaiting the results of further bargaining by the parties." He recommended that "for a 2-year period during which both the parties and the public can better inform themselves on this problem . . . interim work rules changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval, or modification to the Interstate Commerce Commission in accordance with the provisions and procedures of section 5 of the Interstate Commerce Act. . . ." President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining. He stated his

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belief that advances in railroad technology had made it necessary to reduce the railroad labor force, but he insisted that the public should help bear the burden of this reduction in order that it not fall entirely on those employees who would lose their jobs. He warned the Congress that it was highly necessary "for workers to enjoy reasonable protection against the harsh effects of too sudden change." In his message the President expressed no desire to have them pass a law that would finally and completely dispose of the problem of the number of men who should man the crew of a train, but in fact he warned the Congress that "It would be wholly inappropriate to make general and permanent changes in our labor relations statutes on this basis" and that any "Revolutionary changes even for the better carry a high price in disruption . . . (that) might exceed the value of the improvements." Thus the President's message did not in any way indicate a purpose on his part to disturb the existing pattern of full crew laws by supersession of them, either temporarily or permanently.

Congress enacted the bill proposed by the President with one significant change. He had recommended that a binding determination of the issues not resolved by collective bargaining be made by the Interstate Commerce Commission. At least one brotherhood witness testified before the Senate Commerce Committee to an apprehension that the Interstate Commerce Commission if given the power requested would declare State's full-crew laws superseded by orders of the Commission.⁷ Subsequent to this both the House and Senate Committees dropped a section of the proposed bill that would have vested power in the Commission to make binding settlements.⁸ In

⁷ Hearings before Senate Committee on Commerce on S. J. Res. No. 102, 88th Cong., 1st Sess., 629.

⁸ S. Rep. No. 459, 88th Cong., 1st Sess., 9.

instead of that section the Act passed by Congress provided for establishment of an arbitration board to consist of seven members, two appointed by the railroads, two by the unions and three to be appointed by the President should the four members named by the railroads and unions fail to agree among themselves on an additional three. The arbitration board was given power to resolve the dispute over the firemen and full-crew questions. Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the awards would take effect. Awards were made by the board which the railroads now claim call for supersession of the state laws. We hold that neither the Act itself nor the awards made under it can have such an effect.

The text of the Act and the awards made under it contain no section specifically pre-empting the States' full-crew laws nor is there any specific savings clause indicating lack of intent to pre-empt them. Appellees argue, however, that the terms of the Act and the awards are inconsistent with the operation of the state laws and thus the laws are no longer valid. But Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws, for there the size of crews was regulated by statute and not by collective bargaining agreements. The railroads made this very point before the Senate Commerce Committee when a spokesman for three railroads, in commenting on the few jobs that would be lost if the brotherhoods accepted the railroads proposal, said, "25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the States of [listing 13 States including

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nsas].”⁹ It appears, therefore, that Congress did need to pre-empt the state laws in order to eliminate collective-bargaining impasse, and further examination of the legislative history of Public Law 88-108 confirms our view that Congress had no intention of superseding the state full-crew laws by passage of that Act. The President’s proposal was interpreted and extended to the House Committee on Interstate and Foreign Commerce by the Secretary of Labor. On the subject of State full-crew laws he told that Committee:

“I call attention to such statements as those of the *Missouri Railroad Company v. Norwood*, the Supreme Court case in 1930 in which the Court said, ‘In the absence of a clearly stated purpose so to do Congress will not be held to have intended to prevent their assertion of the police power of the States for the regulation of the number of men to be employed in such crews.’ It would be the intention reflected here that the issuance of an interim ruling, subject to termination in a time period or at the agreement of the parties, would not have the effect of affecting any State full crew law.”¹⁰

Chairman of the House Committee on several occasions emphatically stated both in the hearings and on House floor that the bill was not intended, either as proposed or as passed, to supersede state laws. On one occasion he said:

“This issue was raised in the course of the hearings before the committee. Questions were asked of the various people representing management and the labor industry and witnesses representing the labor

hearings before the Senate Committee on Commerce on S. J. No. 102, 88th Cong., 1st Sess., 707.

hearings before the House Committee on Interstate and Foreign Commerce on H. J. Res. No. 565, 88th Cong., 1st Sess., 78.

brotherhoods, the employees' representatives, and the Secretary of Labor. It was made rather clear in the course of the hearings that it would in no way affect the provisions of State laws. The committee in executive session discussed the question and concluded that it was not the intent of the committee in any way to affect State laws. On page 14 of the committee report we included, in order that this history might be made, this language: 'The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains.' " 11

The Chairman of the Committee then went on to tell the House, after referring to this Court's holding in *Missouri Pac. R. Co. v. Norwood*,

"Therefore, since this bill does not mention the subject of State laws, and since, as the committee report shows we do not intend to affect these laws, I am confident they are not affected by the bill.

"I think that is about as clear as we can make it."

Many statements like those quoted above point to the fact that both the Senate and the House members did not intend by enacting Public Law 88-108 to supersede state laws. This sentiment was voiced by witnesses representing both labor and railroads as well as by public officials of the Nation. The railroads seek to offset these carefully considered expressions by reference to a single incident. On one of the occasions when Representative Harris, Chairman of the House Committee reporting the bill, had stated that the Act would not supersede the state law, Representative Smith of Virginia, Chairman of the Rules Committee of the House, interrupted Repre-

¹¹ 109 Cong. Rec. 16122 (1963). See also the Committee Report referred to by Chairman Harris, H. R. Rep. No. 713, 88th Cong., 1st Sess., 14.

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sentative Harris to make the statement set out below.¹² This single statement by Congressman Smith was hardly enough to cast doubt in the minds of the members of the House as to the accuracy of the statement made by Congressman Harris, Chairman of the Committee which reported the bill. The substance of Congressman Smith's statement was that

"I think the provisions of the Constitution are such and the decisions of the Court are such there is no

¹² "Mr. SMITH of Virginia. Mr. Speaker, the colloquy between the gentleman from California [Mr. SISK], and the chairman of the Committee on Interstate and Foreign Commerce, the gentleman from Arkansas [Mr. HARRIS], raises a question that has not previously been discussed on the floor of the House. It was discussed in the committee yesterday before the Committee on Rules. I do not like to remain silent in view of the statement that a State law can overcome the constitutional provision which gives exclusive jurisdiction to the Federal Government in matters of interstate commerce. I do not know what precedents may have been found with reference to this question, but of course, in the matter of purely intrastate commerce under our Constitution the State, of course, would have authority, but when it comes to dealing with interstate commerce I think the provisions of the Constitution are such and the decisions of the courts are such that there is no way in which a State can overcome the power of the Federal Government under the interstate commerce clause.

"I simply wanted to make my own position clear with reference to that question, for whatever it may be worth.

"Mr. EDMONDSON. Mr. Speaker, will the gentleman yield?

"Mr. SMITH of Virginia. I yield to the gentleman from Oklahoma.

"Mr. EDMONDSON. I thank the distinguished chairman of the Committee on Rules for yielding to me at this point. Would this not mean in effect that about the only kind of train operation in which State laws would prevail would be in the switching of cars involving switch engine operations?

"Mr. SMITH of Virginia. Of course, it is just a question of what is or what constitutes interstate commerce. Now, as you know, the decisions of the courts and the actions of the Congress have gone a long way in putting almost everything under interstate commerce. 109 Cong. Rec. 16122 (1963).

way in which a State can overcome the power of the Federal Government under the Interstate Commerce Clause."

This statement was, of course, correct but it has little relevance as to whether the bill was intended to exercise the power of the Federal Government to supersede state laws.

In the face of the clear congressional history of this Act we could not hold that either the Act itself or the arbitration awards made under it supersede the Arkansas state laws.

II.

The railroads contend that the District Court would have been justified in holding the two Arkansas Acts unconstitutional on the second ground of their motion for summary judgment which is that the two Acts "constitute discriminatory legislation against interstate commerce in favor of intrastate commerce." Aside from the fact that such an argument was apparently rejected in the prior cases upholding the constitutionality of the Arkansas statutes we think it is wholly without merit. The argument is based on the fact that the 1907 state law exempts railroads with less than 50 miles of track and the 1913 law exempts railroads with less than 100 miles of track. None of the States' 17 intrastate railroads have more than 50 miles of track. It turns out that none of them are subject to the two state laws while 10 of the 11 interstate railroads are subject to the 1907 Act and eight of them are subject to the 1913 Act. It is impossible for us to say as a matter of law that this difference in treatment by the State, based on the differing mileage of railroads, is without any rational basis as the railroads contend. Certainly some regulations based on different mileage of railroads might be wholly rational, reasonable, and desirable. We cannot say on the record now before us that classification according to the length

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of mileage in these two statutes constitutes discrimination against interstate commerce in violation of the Commerce Clause or the Equal Protection Clause. See *Florida Lime Growers v. Paul*, 373 U. S. 132, 137.

The judgment of the District Court is reversed and the cause is remanded to that court for consideration of the constitutional issues left undecided by its previous judgment.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 69 AND 71.—OCTOBER TERM, 1965.

Brotherhood of Locomotive En-
gineers et al., Appellants,

69

v.

Chicago, Rock Island and Pacific
Railroad Co. et al.

Robert N. Hardin, Prosecuting
Attorney for the Seventh Ju-
dicial Circuit of Arkansas,
etc., et al., Appellants,

71

v.

Chicago, Rock Island and Pacific
Railroad Co. et al.

On Appeals From the
United States Dis-
trict Court for the
Western District of
Arkansas.

[January 31, 1966.]

MR. JUSTICE DOUGLAS, dissenting.

We all agree that Congress has ample power to regulate the number of employees used to man railroad trains operating in interstate commerce. Unlike the majority, however, I believe that Congress has exercised that power, and respectfully dissent from the Court's conclusion to the contrary.

The bargaining impasse which prompted the passage of Public Law 88-108 (77 Stat. 132) represented, in a sense, only the exposed top of a larger iceberg. Lurking beneath the surface of the controversy were the twin problems of automation and technological unemployment. Congress was well aware of the developing conflict between innovation and job security. When President Kennedy sought a legislative solution to the pending crisis in the railroad industry, he reminded Congress that:

"... this dispute over railroad work rules is part of a much broader national problem. Unemploy-

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ment, whether created by so-called automation, by a shift of industry to new areas, or by an overall shortage of market demand, is a major social burden.

"This problem is particularly but not excessively acute in the railroad industry. Forty percent fewer employees than were employed at the beginning of this decade now handle substantially the same volume of rail traffic. The rapid replacement of steam locomotives by diesel engines for 97 percent of all freight tonnage has confronted many firemen, who have spent much of their career in this work, with the unpleasant prospect of human obsolescence. . . . The Presidential Commission was established in part, it said, because of the need to close the gap between technology and work."

The Presidential Railroad Commission to which President Kennedy referred was established by President Eisenhower's order in 1960,¹ and was charged with investigating the dispute which arose out of the railroads' proposed elimination of firemen on diesel engines, and the reduction of the number of other crew members, in freight and yard service. After an extensive study, the Commission issued its report containing detailed findings on all aspects of the dispute. The Commission's recommendations included the elimination of firemen on diesels in freight service and the reduction of the number of brakemen and switchmen. It recommended financial benefits for those separated from service.

This Presidential Railroad Commission was well aware that, however desirable might be a nationwide solution

¹ Executive Order No. 10891, Nov. 1, 1960.

to the problem, the continued existence of state "full crew" laws made this impossible:

"[M]ost of the legislation of this kind was enacted prior to 1920. These laws apparently fail to envision modern railroad operations. We feel that our recommendations with respect to this issue should have nationwide application. We recognize that there will be difficulty in applying the rule recommended by us in States where 'full crew' laws have been enacted. How the restriction of those laws may be lifted, however, is a matter which goes beyond our charge."²

Then came Public Law 88-108, §3 of which empowers the Board to "resolve the matters on which the parties were not in agreement" and to make a binding award which "shall constitute a complete and final disposition of the . . . issues." Section 7 (a) lays down standards for the Board:

- (1) "[T]he effect of the proposed award upon adequate and safe transportation service";
- (2) "[T]he effect of the proposed award upon . . . the interests of the carrier and employees affected"; and
- (3) "[D]ue consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation."

Today the Court concludes that Congress sought only to shear off the visible portion of the iceberg, leaving the continued existence of state "full crew" laws as a bar to the resolution of these matters.

That the state statutes in question conflict with the federal arbitration awards is plain. Congress directed the National Arbitration Board to resolve the dispute as to the necessity of firemen on diesel freights and as

² Report of the Presidential Railroad Commission (1962), at p. 64.

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to the minimum size of train and switching crews. The Board has declared that, in general, firemen are not to be required. And through local boards, the number of brakemen, switchmen, and helpers to be used in various operations is fixed.³ These state laws, however, compel the use of firemen in virtually all interstate operations and fix the size of train crews at levels usually exceeding those fixed by the local awards.⁴ States lacking such laws are, in light of the Court's decision, free to enact them and thereby, in effect, imperil Public Law 88-108 and the arbitration awards made under it. This Court has held that a state statute must fall in the face of an inconsistent provision in a collective bargaining agreement negotiated pursuant to the command of federal law, *Teamsters Union v. Oliver*, 358 U. S. 283, even though

³ The national award provided for the elimination of 90% of the firemen's jobs in each local seniority district, except that firemen would in all cases be required on yard locomotives lacking a "dead-man" control. In addition, jobs had to be made available to firemen retained in service pursuant to the employment protective provisions of the award which, in general, provided that any firemen with 10 years' seniority had to be retained either as a fireman or an engineer. Firemen with between two and 10 years' seniority had to be retained in engine service or offered a comparable position.

As for brakemen and switchmen, the award established procedures for binding local arbitration whereby the number of other crew members might be fixed on a local basis, subject to certain employment protective conditions established by the national Board. The applicable local awards for Arkansas railroad operations provide for two brakemen on main-line operations and one brakeman on branch-line operations. In switching operations, the local awards provide, with certain exceptions, for one helper.

⁴ Thus Arkansas law requires a fireman on every train, with certain exceptions, while the arbitration award permits abolition of 90% of the firemen's positions. Arkansas requires three brakemen while the arbitration award requires no more than two. Similar conflicts appear in respect to the yard operations.

Congress did not prescribe the particular terms of the agreement. And see *California v. Taylor*, 353 U. S. 553. We have here something more than collective bargaining agreements. These arbitration awards are binding directives, resolving a labor-management dispute, issued under the direction and authority of Congress.

The problems submitted to the Arbitration Board concerned primarily two central issues: (1) continued use of firemen on diesel-electric or electric locomotives which do not use steam power, and on which the work of firing boilers need not be performed; (2) the makeup or "consist" of train service crews in road and yard. These are matters recognized by the Board as governed in some States "by statute or administrative decision." Indeed, a resolution of them in many situations might involve overriding or disregarding conflicting local regulations. Any realistic view of the scope and nature of the impasse the parties had reached would necessarily endow the Board with power to resolve conflicts between what it deemed to be the desirable national policy on the one hand and conflicting state laws on the other.

The issues were far-reaching; they included questions in the realm of economics, of railroad technology, and of sociology. This was a controversy that years of collective bargaining, study, informed analysis, persuasion, and debate had not been able to resolve. The Board's seven members^{*} held 29 days of hearings, received the testimony of more than 40 witnesses recorded in nearly 5,000 pages of transcript, examined more than 200 documentary exhibits, and made inspection trips to four rail-

^{*} The Chairman of the Board was Ralph T. Seward. The other two neutral members were Benjamin Aaron and James J. Healy. Representing the carriers were Guy W. Knight and J. E. Wolfe. Representing the labor organizations were H. E. Gilbert and R. H. McDonald.

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road yards in the Chicago area. Its award⁶ was concurred in by the two carrier members and dissented from by the labor members.⁷ The opinion of the neutral members of the Board details the conclusions the panel reached. It states, as to the question of firemen, that:

"although we think it clear that firemen are presently performing useful services, we agree with the [Presidential Railroad] Commission 'that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels.'"⁸

The Board found, in respect to the other members of the train crew, that "the consist of crews necessary to assure safety and to prevent undue workloads must be

⁶ See note 3, *supra*.

⁷ The carrier members, while "disappointed with certain of [the] provisions" of the award, noted the "care and diligence" which the Board had displayed in reaching its decision. The labor members contended that the Board had not been true to the congressional command and that its conclusions were erroneous.

⁸ The opinion states that the "lookout function presently assigned to the firemen is also being performed by the head brakeman in road freight service and by all members of the train crew in yard service. In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members."

The mechanical duties performed by firemen, the Board found, could in large part "be performed by the engineer while the locomotive is in service and by shop maintenance personnel at other times."

Finally, the Board found that relief of the engineer by the fireman is of critical importance only in the event of sudden incapacitation. "In road freight service the usual presence of the head brakeman in the cab obviates the need for a fireman in such an emergency."

determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic." The Board established procedures for local arbitration of these issues. And, the Board added,

"It is clear from the evidence before us that the myriad of local arrangements has led to numerous inconsistencies in the manning of crews. It is equally clear that some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions."

The Board's concern with safety is apparent from a reading of the neutral members' opinion. As that opinion puts it:

"It may be fairly stated that concern with safety has pervaded this entire proceeding. It was apparent in the presentations and arguments by all the organizations and by the carriers, and was further emphasized by the inquiries which members of the Board directed to witnesses and counsel."

We are in no position, of course, to pass judgment on the work of the Arbitration Board, nor is it our function to do so. But it is apparent that this panel had the power and the tools to resolve the controversy. Its award constitutes a national solution to the question of firemen and establishes the procedures, already utilized in respect to these railroads operating in Arkansas, for resolution of the crew consist issue.

I conclude that the effect of Public Law 88-108 and the awards made pursuant to it was to supersede state "full crew" legislation. Of course, were the intent of Congress shown to be otherwise, that would be dispositive. Unlike the majority, I do not think that the bits and pieces of legislative debate cited in the Court's opinion can be regarded as a controlling statement of

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legislative intent. If anything, the legislative history of Public Law 88-108 suggests that Congress refused to accept the suggestion that, if it wished to avoid the supersession of state "full crew" laws, it should expressly say so.

The majority points to statements made by Congressman Harris, Chairman of the House Committee on Interstate and Foreign Commerce, to the effect that the bill would have no effect on state laws. But when he stated his conclusion on the floor of the House, he was immediately challenged by Congressman Smith, Chairman of the Rules Committee. Under the circumstances, it seems inappropriate to regard Congressman Harris' views as wholly authoritative. The testimony of Secretary Wirtz, also referred to by the Court, was followed by a legal memorandum submitted by the Secretary. This memorandum suggests that the Interstate Commerce Commission would, under the proposed legislation, have the power to supersede state legislation, and that to avoid this the Commission might expressly provide to the contrary in its orders.⁹

The absence of an express disclaimer of intent to supersede state law was called to the attention of Con-

⁹ See Hearings before House Committee on Interstate and Foreign Commerce on H. J. Res. No. 565, 88th Cong., 1st Sess., 112-113. The reference to the Interstate Commerce Commission was made, of course, because at that stage Congress was considering the legislation in the form proposed by the President, which contemplated resolution of the dispute by the Commission.

The report of the Committee reflects the view of its Chairman and states that state full-crew laws would not be superseded. H. R. Rep. No. 713, 88th Cong., 1st Sess., 14. It bears repeating that this position was challenged by Congressman Smith on the floor of the House. And it is also significant that the report of the Senate Commerce Committee (S. Rep. No. 459, 88th Cong., 1st Sess.) makes no mention of the pre-emption question, despite references to it in the Committee's hearings. See note 13 and accompanying text and note 14, *infra*.

gress. Testifying before the House Committee, Secretary Wirtz did so.¹⁰ The General Counsel of the Interstate Commerce Commission told the Committee that if "the Congress wants to be doubly certain, for example, that no such legal consequence follows it could be done" by expressly stating that no supersession is intended.¹¹ To this the Chairman responded:

"I appreciate your very frank response, because I think it has sort of been left up in the air as to what the courts might do. There has been expression as to what is intended and what some might have thought but I think we also have to provide clarity wherever it is necessary in order that the Commission may have guidance in its effort to carry out the responsibility should it be so directed."¹²

The Commission's General Counsel testified to the same effect before the Senate Commerce Committee:

"If it were desired to make that absolutely certain, if that is the desire of Congress, it can be done by just a phrase"¹³

Despite this advice, Congress did not include a "saving" clause.¹⁴

¹⁰ *Id.*, at p. 111.

¹¹ *Id.*, at p. 614.

¹² *Ibid.*

¹³ Hearings before Senate Committee on Commerce on S. J. Res. No. 102, 88th Cong., 1st Sess., 401.

¹⁴ The possibility that the bill would result in the supersession of state laws was noted at other points in the Senate Commerce Committee hearings. A representative of the Brotherhood of Locomotive Engineers testified:

"Mr. DAVIDSON. Mr. Chairman, I was just handed a note that I would like to read into the record, if I may.

"Senator PASTORE. All right.

"Mr. DAVIDSON. General Counsel for the ICC, at the House

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gress was faced, at the time it enacted Public Law 85-601, with more than the threat of a crippling strike, before it the recommendations of the Presidential Commission. It had been told by the President of the seriousness of the problem of technological unemployment arising from automation. Congress responded by establishing a procedure for resolution of the railroad industry's pressing economic problem with consideration of the "safety" issue. It is inconceivable that Congress intended to solve only part of the problem when it directed the Arbitration Board to make an award which "shall constitute a complete and final disposition of the . . . issues."

Sum, I agree with District Court that, "There is nothing in the Act itself or in the history that indicates the Congress intended to resolve this problem of

today, stated if this bill passes, the Commission would have jurisdiction over States' minimum crew bills.

tor PASTORE. I don't want to pass any judgment on that. I will read it into the record. I will check that." *Id.*, at 475. General Counsel of the Railway Labor Executives' Association testified: "I certainly visualize that as a bare minimum the Commission will contend that the effect or orders of the Commission regarding decreases in crew consist—either of engineread or train-read would operate to overrule full crew laws in those States that have them. Perhaps that explains the alacrity with which the Commission embraced the President's recommendations and endorsed them," at 629.

stated by the District Court: "A complete review of the legislative history will reveal that some members of Congress thought the legislation would pre-empt state crew consist laws, and some thought it would not. It is perfectly clear that the Commission in both Houses had it brought effectively to their attention that the legislation might have a pre-empting effect, and if such pre-emption was not the desire and intention of the Congress, it should have been so stated in the bill. There was no such expression although the bill was amended in many other respects after the hearings before the committees had been concluded." 239 F. Supp., pp. 23-24.

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national magnitude by legislation that would be effective in only some 30 states that do not regulate crew consists by law or administrative regulation." 239 F. Supp. 1, 23.

Although automation was a prime concern of the President and the Congress, the Court holds that the lawmakers cloaked their concern in such weasel-like words as not to reach the roots of the problem. With all respect, I dissent.